EDITOR'S NOTE

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85-112

Title: Scuare D Company and Big D Building Supply Corp., Petitioners
v.
Niagara Frontier Tariff Bureau, Inc., et al.

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Rigler, Douglas V.

Counsel for responcent: Rea Jr., Bryce, Bridgeman, Lester M., Bryant, John W., Freec, Charles L., Flexner, Donald L., Harris, Joel B.

ntry	Date	Note	Proceedings and Orders
1	Jul 5 1985	G	Petition for writ of certiorari filed.
2	Aug 2 1985		Brief of respondents Niagra Frontier Tarriff Bureau, Inc, et al. in opposition filed.
3	Aug 5 1985		Brief amicus curiae of United States filed.
4	Aug 14 1985		Supplemental brief of respondents filed.
5	Aug 21 1985		DISTRIBUTED. September 30, 1985
6	Aug 29 1985	X	Reply brief of petitioners Scuare D Co., et al. filed.
7	Sep 23 1985	X	Supplemental brief of responcent Dominion-Consolidated Truck filed.
9	Oct 2 1985	X	Brief of petitioners Square D Co., et al. in response to Respondents' Supplemental Brief filed.
10	Oct 7 1985		Petition GRANTED.
			**********
11	Nov 21 1985		Brief amicus curiae of United States filed.
12	Nov 21 1985		Joint appendix filed.
13	Nov 21 1985		Brief of petitioners Square D Co., et al. filed.
14	Nov 21 1985	G	Motion of C. D. Ambrosia Trucking Company, Inc., et al. for leave to file a brief as amici curiae filed.
15	Nov 21 1985	G	Motion of western Fuels Association, Inc. for leave to file a brief as amicus curiae filed.
16	Nov 27 1985	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Dec 9 1985		Motion of C. D. Ambrosia Trucking Company, Inc., et al. for leave to file a brief as amici curiae GRANTED.
18	Dec 9 1985		Motion of western Fuels Association, Inc. for leave to file a brief as amicus curiae GRANTED.
19	Dec 9 1985		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Dec 11 1985		Record filed.
21	Dec 11 1985		Certified copy of original record and C.A. proceedings received.
23	Dec 20 1985		Order extending time to file brief of responcent on the merits until January 3, 1986.
24	Dec 20 1985		Above extension applies to all responcents.
25	Jan 3 1986	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
26	Jan 3 1986		Brief of respondent filed.

o. 85-21-CFX

ntry	Date	Note	Proceedings and Orders
27	Jan 3 1986	G	Motion of American Information Technologies Corp., et al. for leave to file a brief as amici curiae filed.
28	Jan 3 1986	G	Motion of National Motor Freight Traffic Association, Inc., et al. for leave to file a brief as amici curiae filed.
29	Jan 7 1986		CIRCULATED.
30	Jan 14 1986		Opposition of petitioners to motion of National Motor Freight Traffic Association, Inc.,et al. for leave to file a brief as amici curiae filed.
31	Jan 21 1986		Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
32	Jan 21 1986		Motion of American Information Technologies Corp., et al. for leave to file a brief as amici curiae GRANTED.
33	Jan 21 1986		Motion of National Motor Freight Traffic Association, Inc., et al. for leave to file a brief as amici curiae GRANTED.
34	Feb 21 1986	X	Reply brief of petitioners Square D Co., et al. filed.
35	Mar 3 1986		ARGUED.

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No. 85-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the 1922 Supreme Court decision in *Keogh v. Chicago & N.W. Ry.* today preclude shippers from recovery of damages under the antitrust laws for the conspiratorial acts of a rate bureau and member carriers who knowingly violate the Interstate Commerce Act, related ICC regulations, and their rate bureau agreement?

LIST OF PARTIES

Petitioners Square D Company and Big D Building Supply Corp. are two corporations which shipped commodities between the Province of Ontario, Canada, and the Eastern United States via motor freight carriers belonging to the Niagara Frontier Tariff Bureau. They have brought suit in their individual capacity and on behalf of a class of shippers whose goods were transported by the five defendant motor carrier members of the Niagara Frontier Tariff Bureau. In conformance to Supreme Court Rule 28.1, the following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of Square D Company: Furukawa Circuit Foil Co., Ltd., Square D (Saudi Arabia) Ltd., Square D (S.A.) and Palatine Hills Leasing, Inc.

The defendants in this action are the Niagara Frontier Tariff Bureau ("NFTB"), a motor carrier rate bureau registered with the Interstate Commerce Commission, and five motor carrier members of the Bureau which are engaged in the transportation of motor carrier freight between Canada and the United States. These carriers are Bondy Cartage Limited; Dominion-Consolidated Truck Lines, Limited; ICL International Carriers Limited; Inter-City Truck Lines (Canada), Inc.; and TNT Canada, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
Introduction	5
1. The *Keogh* Decision Never Was Intended To Apply To Conspiracies To Avoid A Regulatory Plan	7
2. The 1922 Rationale Employed By The Court In *Keogh* Has Been Discarded	8
3. Application of *Keogh* Contravenes This Court's Holdings That Implied Exemptions To Antitrust Liability Are Strongly Disfavored	11
4. Application Of *Keogh* To Prevent the Recovery Of Damages Effectively Leaves Shippers By Motor Carrier Without A Means of Recompense For Illegal Overcharges	12
5. The Second Circuit's Decision Presents An Important Case of Statutory Interpretation	13
6. The Opinion Of The Second Circuit, If Allowed To Stand, Would Result In An Illogical Discrimination In The Application Of The Antitrust Immunity Through Regulatory Statutes	16
7. The Circuit Court's Conclusion That Shippers May Not Recover Antitrust Damages From Carriers Ostensibly Subject to ICC Regulation Is Incompatible With This Court's Decision In *ICC v. American Trucking Association*	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	9, 16
City of Groton v. Connecticut Light & Power, 662 F.2d 921 (2d Cir. 1981)	16
City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978)	16
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	11
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	11
Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)	10
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	10
ICC v. American Trucking Assn., 104 S. Ct. 2458 (1984)	9, 10, 12, 16
Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922)	*passim*
MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983)	16
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	11
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	12
Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S.Ct. 1721 (1985)	14
United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)	11
In re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305 (7th Cir. 1985)	15, 17
STATUTES:	
The Reed-Bulwinkle Act, 62 Stat. 472 (1948)	2, 14, 15
The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	6, 14, 15
The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)	6, 15
49 U.S.C. § 10706 (1982)	3, 15
49 U.S.C. § 11705 (1982)	13
49 U.S.C. § 11706 (1982)	2, 13
28 U.S.C. § 1254(1) (1982)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, *et al.* v. NFTB, *et al.*

On Petition of Square D Company and Big D Building Supply Corp. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 9, 1985.

OPINIONS BELOW

The Court of Appeals for the Second Circuit issued its Opinion, reproduced at Appendix pp. 1a-40a, on April 9, 1985. The Order of the Court of Appeals remanding these actions to the District Court in conformance with the Court's Opinion of April 9, 1985 is reproduced at Appendix pp. 41a-42a. The Opinion and Order of the District Court which ordered dismissal of these actions and which gave rise to the appeal is reproduced at Appendix pp. 44a-50a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 9, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 5(b)(9) of the Reed-Bulwinkle Act, 62 Stat. 472 (1948).

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

STATEMENT OF THE CASE

In June 1983, the United States filed a civil complaint against the Niagara Frontier Tariff Bureau ("NFTB") and five motor carrier members charging that they had engaged in a secret price fixing conspiracy beginning at least as early as 1966 and continuing at least into 1981. The Government alleged that the defendants organized an undisclosed "Principals Committee" comprised of senior management officials of the NFTB and certain executives of some of the NFTB member carriers. The Principals Committee was not authorized by the Interstate Commerce Commission to engage in rate-making conduct. Indeed, the existence of the Committee was kept secret from the ICC. The complaint alleged that through the Principals Committee, the defendants and unnamed co-conspirators engaged in motor freight rate fixing and also agreed upon methods by which

to inhibit competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada.

On July 8, 1983, Square D Company filed a complaint under Sections 4 and 16 of the Clayton Act alleging the same violations of the antitrust laws as set forth in the Government's civil complaint and seeking to recover damages for the injuries which it had sustained as a result of these violations. The Square D complaint alleged that the defendants:

a) Set and controlled Niagara Frontier Tariff Bureau rate levels without complying with the notice, publication, public hearing or recordkeeping requirements of the NFTB agreement and Interstate Commerce Commission regulations;

b) Held Principals Committee and other meetings to plan threats, coercion and retaliation against other NFTB member carriers for exercising their right of independent action;[1]

c) Through pressure, coercion, threats of retaliatory rate reductions, taking retaliatory rate reductions, internal NFTB practices, and other means, interfered with, restrained and restricted the right of NFTB member carriers and non-member carriers to make rates independent of the NFTB agreed-upon rates;

---

[1]Independent action is the right of a motor tariff bureau member to make a unilateral tariff filing with the ICC. This right is guaranteed by statute, formerly 49 U.S.C. § 5b(6) (1976), currently codified at 49 U.S.C. § 10706(b)(3)(B)(ii) and, ostensibly, by the NFTB Rate Bureau Agreement on file with the ICC. NFTB Bylaws effective June 1, 1981, Article XVII.

d) Filed tariffs with the ICC in Washington, D.C. that were in furtherance of the conspiracy.

The action was filed by Square D for itself and as a representative of a class of purchasers of freight transport between the United States and Ontario, Canada on the defendant motor carriers. On October 7, 1983, Big D Building Supply Corp. filed a similar complaint. These actions have been consolidated in the United States District Court for the Western District of New York.

Defendants filed a motion before the District Court pursuant to F.R.Civ.P. 12(c) and 12(h)(2), for judgment on the pleadings as to appellants' claim for damages. The sole basis for the motion was an assertion that the holding in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922) precluded the recovery of damages under the antitrust laws. The *Keogh* decision held that rates which had been investigated and approved by the ICC as reasonable were not subject to collateral attack under the antitrust laws even though the rates were the product of joint rate setting activities. The Court's holding in *Keogh*, which immunized rates set in *compliance* with ICC procedures, was held in the instant case to insulate the defendants' activities taken in *violation* of ICC procedures from antitrust damage claims.

As was necessary for purposes of their motion, the defendants agreed that all material allegations of plaintiffs' complaints were to be taken as true and correct. In subsequent oral argument defendants reiterated their admission that for purposes of their motion, the violations plaintiffs allege are "outside the scope of antitrust immunity." Transcript of oral argument before the District Court, reproduced at Appendix p. 56a.

The District Court granted defendants' motion and dismissed plaintiffs' complaint. On appeal to the United States

Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed on the basis that the holding in *Keogh* prevented maintenance of an action to recover collusively established overcharges.[2] This petition, therefore, presents the single legal issue of whether the 1922 *Keogh* decision effectively bars any claim for damages flowing from antitrust violations which, as conceded by the defendants, are outside of any ICC-granted immunity.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Introduction

The *Keogh* decision of 1922 accommodated two competing national policies embodied in different statutory plans. The Sherman Act reflected a Congressional determination that price fixing and coercive acts to prevent others from offering competitive prices were harmful to the nation's economy. However, under the Interstate Commerce Act, joint rate making by surface transportation carriers was subject to government supervision of the jointly proposed rates and opportunity for shippers to be able to oppose ICC approval of unreasonably high rates.

Keogh, a flax manufacturer who shipped goods by rail, complained to the ICC that proposed jointly set rail transport rates were excessive. The ICC suspended the proposed rates, investigated them and heard testimony from Keogh in support of the charge that the contested rates were too high. On the basis of the record generated by the investigation and hearing, the ICC approved the rates. Only then did

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[2]In their motion, defendants had not sought dismissal of plaintiffs' entire complaint, but had requested relief only with respect to plaintiffs' damage claim. The Court of Appeals reinstated plaintiffs' claim for injunctive relief and granted plaintiffs an opportunity to amend their complaints to state a claim for damages other than the damages precluded by the application of the *Keogh* doctrine.

Keogh launch a collateral attack on the jointly set rates by contending that the joint rate making process constituted price fixing forbidden by the Sherman Act. In 1922 Congress had not addressed the apparent contradiction in statutory direction between the Sherman Act and the Interstate Commerce Act, and it was left to the Court to decide if joint rate making under ICC supervision was immune from antitrust attack. In the *Keogh* decision, the Court refused to permit Keogh to pursue a damage claim under the antitrust laws.

The *Keogh* holding has not been reviewed by this Court since 1922, despite passage in 1948 of the Reed-Bulwinkle Act in which Congress articulated the antitrust immunity which compliance with ICC rate making procedures would confer. The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.)[3] also limited the circumstances under which joint rate making activity may qualify for antitrust immunity. Thus, the Court has not reviewed the *Keogh* rationale in light of significant statutory changes in which the Congress made an express grant of antitrust immunity to carriers which comply with the ICC regulatory plan.

Although this Court has held that government-regulated conduct may be exempt from antitrust challenge, it correspondingly has held that any such immunity should be express rather than implied and that exempted conduct must be in compliance with the regulatory plan. Despite its repeated applications of this fundamental rule to a number

[3]See also the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified in scattered sections of 45 U.S.C. and 49 U.S.C.), which substantially lessened ICC regulation of railroad rates in order to increase competition in surface transport of commodities.

of regulated industries, however, the Court has not applied the rule directly to surface carriers subject to ICC regulation. If the Second Circuit's opinion is allowed to stand, there will be a significant discrepancy between this Court's consistent conditioning of antitrust immunity in a regulated industry context to compliance with a statutory plan and the result rendered by the lower court in this action. Contrary to this Court's policy determinations, motor carrier defendants who deliberately circumvent and frustrate a statutory plan of regulation will be able to retain overcharges obtained by such violations.[4]

1. The Keogh Decision Never Was Intended To Apply To Conspiracies To Avoid A Regulatory Plan

In the instant case, the *Keogh* doctrine is being used to shield from redress activities which were not even presented to this Court in the *Keogh* decision. First, the *Keogh* controversy concerned published rate agreements which were submitted to the ICC for review. The rates were approved after investigation and hearing. When it decided *Keogh*, the Court was not considering a situation in which the ICC rate oversight process was being subverted.

Second, the defendants herein also claim immunity for coercive activities including those undertaken to *prevent* other carriers from filing independent rates. Essentially, they assert that the *Keogh* decision protects secret conspiracies to *suppress* rate filings. In such cases, the ICC never has a chance to review, let alone approve, rate proposals which are prevented through coercion from being filed. It is

[4]As discussed in point 4, *infra*, there is no effective remedy which the victimized shippers can obtain at the ICC, so that under the lower court's reading of *Keogh*, the defendants are assured that they profit by cheating on the ICC procedures. It is doubtful that this was the intended result of the *Keogh* decision.

unlikely that even in 1922 the Court intended to immunize this type of anticompetitive activity as a necessary adjunct to the success of federal regulation of surface transportation rates.

2. The 1922 Rationale Employed by the Court in Keogh Has Been Discarded

None of the four reasons given in the *Keogh* decision in support of what appeared a logical result in light of the fact situation presented and the then existing statutory framework has any current validity. Rather, there have been specific disavowals of the elements of the 1922 rationale by this Court. The continuing rote application of a decision whose rational has been discarded deserves the review of this Court. This is especially true when application of a rejected doctrine deprives victims of a hard-core price fixing scheme, unauthorized by any regulatory agency, of any effective means of redress.[5]

What remains of the *Keogh* decision is a hollow shell, which serves only as a device to enable those who violate *both* the ICC statutes and the antitrust laws to retain illegal overcharges. Perhaps this explains why the Court of Appeals stated that ". . . much of the reasoning of *Keogh* seems outdated. . ." (Appendix, p. 3a) and that the arguments advanced in support of the decision ". . . do not seem so compelling today as they did in 1922." (Appendix, p. 9a). It concluded, however, that *Keogh's "language* has not been overruled," and if it is to be overruled, "that task is for the Supreme Court." (Appendix, p. 3a). (emphasis added.)

A fair reading of the Opinion of the Second Circuit Court of Appeals, authored by Judge Friendly and joined by Chief

[5]The conduct in question not only was not submitted to the ICC for review and approval, but it could not have been approved in any event since the conduct is forbidden by statute and regulation.

Judge Feinberg and Judge Kaufman, indicates a belief that *Keogh* is bad law and should be overruled. Unmistakeably, the Circuit Court concluded that none of the reasons advanced in support of the original *Keogh* ruling is applicable today. The Court of Appeals emphasized that "the case for reaching a contrary conclusion today to that reached by Justice Brandeis is particularly strong in light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates." (Appendix, p. 15a).

The Circuit Court's comments with respect to the invalidity of the four reasons which in 1922 seemed to justify the result in *Keogh* are instructive.

a) The Second Circuit found that the fear that recovery of antitrust damages would operate "like a rebate" to produce discrimination among shippers ignored the fact that damages do not represent an under-the-table payment but rather a court determination that the shipper has suffered antitrust injury. The Circuit Court pointed out that adversion to a rebate as a justification for *Keogh's* application is inconsistent with this Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966) in which the Court expressly rejected this concern as a reason for refusing damages. *Accord, ICC v. American Trucking Assn.*, 104 S. Ct. 2458 (1984). The Court of Appeals also noted that the argument does not apply to class actions such as the pending two actions.

b) The requirement that an injured shipper prove its damages by showing that a hypothetically lower rate which the carriers would have charged in the absence of the antitrust violation conformed to the requirements of the Interstate Commerce Act is, according to the Court of Appeals, "even less compelling." The Second Circuit correctly points

out that any such concern has been overcome in many later decisions of this Court. *See ICC v. American Trucking Assn.*, 104 S. Ct. 2458, 2463, n.5 (1984). Moreover, antitrust damages based on comparisons between the illegally fixed rate and the competitive rate which would have prevailed have been upheld in regulated industries which do not involve rail or motor freight transportation. There is no greater or lesser degree of difficulty for a plaintiff to meet its burden of proving damages for excessive motor freight transportation costs than for other sales or service overcharges.

c) Justice Brandeis' assertion in *Keogh* that shippers would have difficulty in proving that they were entitled to damages based on the lower rates which would have prevailed absent the conspiracy because they may have passed on the benefit of the lower rates to their customers is, according to the Court of Appeals, "still less persuasive in view of later developments." The Circuit Court was referring, *inter alia*, to this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) which effectively eliminated the pass-on defense.[6]

d) In *Keogh*, Justice Brandeis had asserted that a rate is not necessarily illegal even though it is the result of a conspiracy in restraint of trade because the legality of rates is determined by the Interstate Commerce Act. 260 U.S. at 162. The Circuit Court disagreed with this assertion. It observed that the ICC recognizes a zone of reasonableness in shipping rates. Where rates within this zone are increased as a result of a conspiracy, a shipper should be allowed to recover the excess of a reasonable rate over a still lower reasonable rate that would have prevailed absent the conspiracy.

[6]The Court of Appeals also referred to this Court's decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) in which this Court described the *Keogh* decision as mere "dictum" to which no general significance was to be ascribed "where the plaintiff is free to prove that he has been charged an illegally high price." 392 U.S. at 491, n.8.

3. Application of Keogh Contravenes This Court's Holdings That Implied Exemptions to Antitrust Liability Are Strongly Disfavored

Even in 1922 *Keogh* stood for the proposition that the presence of the ICC regulatory plan gave rise to an *implied* exemption to antitrust liability under the Sherman Act. Until 1948, with the passage of the Reed-Bulwinkle Act, the Interstate Commerce Act did not deal with the question of when and under what circumstances limited exemption from the antitrust laws could be obtained by carriers in compliance with the Act. During the 60 years since the *Keogh* decision was announced, however, this Court repeatedly has held that implied exemptions to antitrust liability—such as the *Keogh* doctrine necessarily represents—are "strongly disfavored." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973).[7] The Court has stated that implied immunity is recognized only as necessary to avoid frustrating regulatory policy as "where there is a 'plain repugnancy between the antitrust and regulatory provisions,'" *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. at 350-51). Even in cases of plain repugnancy, the immunity is recognized only "'if necessary to make the [statutory scheme] work, and even then only to the minimum extent necessary.'" *Gordon v. New York Stock Exchange*, 422 U.S. at 683

[7]"[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions. . . ." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

(quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

Judge Friendly correctly discerned that there would be no repugnancy between the application of the antitrust laws to carriers which violate the regulatory plan and the proper operation of that plan. That conclusion was reaffirmed in the Court's holding in last term's *ICC v. American Trucking Assn.*, 104 S. Ct. 2458 (1984), in which the Court recognized that antitrust damage actions can be maintained consistent with and complementary to the ICC regulatory plan.

4. Application of Keogh To Prevent The Recovery Of Damages Effectively Leaves Shippers By Motor Carrier Without A Means of Recompense For Illegal Overcharges

As the Second Circuit noted and as recognized by this Court in *ICC v. American Trucking Assn.*, only a minute percentage of tariffs filed with the ICC are investigated at all. The sheer volume of filings makes investigation of the vast majority of tariffs impossible. In the recent *ATA* decision, *supra*, the Court found that the ICC reviews "only a random sampling of tariff filings, and tariffs with obvious defects inevitably are permitted to go into effect." *ATA*, 104 S.Ct. at 2463. For example, the ICC reported that for the year 1983, there were only 188 examinations conducted and 11 suspensions ordered with respect to more than 1,200,000 filings.

Even the original *Keogh* doctrine was grounded upon the assumption that the ICC was able to make an effective determination as to the reasonableness of a tariff filing. That assumption has not applied for many years. In *ATA*, this Court noted ". . . the [Interstate Commerce] Commission maintains that its penalty authority is too weak to guarantee compliance with [rate] bureau agreements." *ATA*, 104

S.Ct. at 2467. Upholding *Keogh* today would represent a nonsensical form of public policy. It would permit carriers to bilk shippers on the pretense that overcharges are prevented by an effective regulatory plan even though it is evident that the regulatory plan has been circumvented. The miscreant carriers should not be allowed to hide behind the mere existence of a regulatory plan when they deliberately set out to frustrate that plan.

Additionally, the Court should note that even if a shipper were to seek recovery of overcharges through application to the ICC pursuant to 49 U.S.C. § 11705 (1982), any recovery rights are limited by the two-year statute of limitations imposed by 49 U.S.C. § 11706 (1982). Where defendants successfully conceal their illegal activities, even the theoretical possibility of recovering through an ICC proceeding is lost.

The Niagara Frontier Tariff Bureau violations involved hundreds of tariff filings and supression of countless independent tariff filings by would-be competitors. The ICC with its limited resources and statutory impediments simply cannot extend relief in cases of massive undercover conspiracies such as the conspiracy presented herein. If *Keogh* is read as a bar to antitrust damages even for unauthorized rate fixing, then there is no way for victims of the conspiracy to obtain recompense.

5. The Second Circuit's Decision Presents An Important Case of Statutory Interpretation

Despite Judge Friendly's careful analysis of the legislative history of the Reed-Bulwinkle Act, the conclusion reached by the Court cannot be accommodated with the express language of Section 5b(9) of the Act. Section 5b(9) provides:

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.[8]

The Circuit Court's reading of Section 5b is inconsistent with the statute's clear statement that antitrust immunity extends solely to agreements approved by the ICC and carried out in conformity with terms and conditions prescribed by the Commission. Any other interpretation renders Section 5b(9) a statutory nullity. The Circuit Court's interpretation conflicts with the general rule that legislative history does not overcome clear and express statutory language and with this Court's repeated admonitions that implied antitrust immunity is disfavored.[9]

The United States apparently agrees with petitioners' reading of the Reed-Bulwinkle Act. In its complaint against the Niagara Frontier Tariff Bureau, the Government specifically alleged:

> Relief from the antitrust laws under the Reed-Bul-

[8]49 U.S.C. § 5b(9) (1976 ed.), 62 Stat. 472 (1948). Because of the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, this provision does not appear in the 1982 edition of the United States Code.

[9]In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S.Ct. 1721, 1734 (1985), Justice Stevens, writing in dissent, but on an uncontested point, noted that Congress did make a policy decision with respect to price fixing in the transportation industry and that that policy choice was effectuated in the Reed-Bulwinkle Act.

> winkle Act is strictly limited to the terms of the approved agreement, and it does not extend to conduct that the ICC is not empowered to authorize, or if empowered, has not authorized.

Any lingering doubts as to whether Congress intended compliance with the ICC regulatory procedures to be a condition of antitrust immunity were resolved by the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. The Court of Appeals agreed that Section 14 of the Act, 49 U.S.C. § 10706, limited the scope of available antitrust immunity. (Appendix, p. 27a). It held that in cases involving anticompetitive activities which occur after October 1, 1980—the effective date of the Motor Carrier Act of 1980—the change effected by that statute will have to be taken into account. (Appendix, p. 17a).[10]

Petitioners also agree that the effect of the Motor Carrier Act of 1980 must be taken into account in determining whether the *Keogh* doctrine has been revised by the Congress. As is clear from its opinion, however, the Circuit Court believes that the issue of *Keogh's* current validity should be addressed by the Supreme Court, and that irrespective of the Circuit Court's doubts as to *Keogh's* applicability, lower courts should hesitate to announce the demise of even long rejected language of prior Supreme Court decisions.[11]

[10]The Court of Appeals for the Seventh Circuit appears to disagree that recent deregulation statutes such as the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, have permitted injured shippers to sue for damages under the antitrust laws. See *In re Wheat Rail Freight Antitrust Litigation*, 759 F.2d 1305 (7th Cir., 1985).

[11]Judge Friendly noted that petitioners contended that antitrust immunity was limited by Congress with the passage of the Reed-Bulwinkle Act in 1948. Petitioners adhere to their position that the Motor Carrier Act of 1980 merely reconfirmed that the *quid pro quo* for immunity which Congress legislated in 1948 is compliance with the regulatory procedures.

6. The Opinion Of The Second Circuit, If Allowed To Stand, Would Result In An Illogical Discrimination In The Application Of The Antitrust Immunity Through Regulatory Statutes

Although the Circuit Court correctly observed that there are differences in the regulatory plan encompassed by the Shipping Act of 1916 and the Interstate Commerce Act, these differences do not justify permitting shippers by ocean freight to recover antitrust damages while denying such recovery to shippers by motor carrier freight. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213 (1966). Likewise, purchasers of services or commodities in other regulated industries, such as wholesale electric power, *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), and communications, *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983) have been accorded the right to sue for compensatory damages under the antitrust laws. The underlying rationale of *Keogh*, if it were valid, should apply equally in these regulated industries. Instead, it now appears that shippers by motor transport or rail transport are singled out in being denied the opportunity to recover for overcharges occasioned by deliberate violations of a regulatory plan.

7. The Circuit Court's Conclusion That Under No Circumstances May Shippers Recover Antitrust Damages From Carriers Ostensibly Subject To ICC Regulation Is Incompatible With This Court's Decision In ICC v. American Trucking Association

The *Keogh* doctrine is thoroughly incompatible with the position taken by all nine justices in last term's *ICC v. American Trucking Assn.* decision, 104 S. Ct. 2458 (1984). Both the majority and the minority were in agreement that

it is possible for shippers who are injured by violations of ICC regulations to obtain damages under the antitrust laws. A major issue which divided the Court in that decision was whether the prospect of such damages, when coupled with additional reparations available under the MCA's recent amendments to the Interstate Commerce Act, suggested limitations on the remedy which the ICC might impose for regulatory violations.

It is correct that the antitrust damages which were contemplated in *ATA* would be those available after a decision of the ICC disapproving filed rates. This does not overcome the fact that *Keogh* is claimed to shield defendants from payments of *any* antitrust damages irrespective of whether the rates are found to be defective or, in the instant case, set in circumvention of the ICC's own rules.[12]

CONCLUSION

In sum, it may be said of the *Keogh* doctrine:

1. That its continued application would present a significant injustice affecting the national economy since it permits carriers to utilize the mere existence of a regulatory plan they are circumventing to accumulate excessive profits at the expense of shippers.

2. That *Keogh* is inconsistent with the Court's repeated admonition that implied immunity from the antitrust laws is disfavored.

3. That the doctrine is discriminatory in a significant economic sense because this Court has held in the context of

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[12]In *Wheat Rail Freight*, 759 F.2d at 1316, the Court of Appeals for the Seventh Circuit recently decided that the *Keogh* doctrine precluded recovery of antitrust damages even as to rates which were disapproved by the ICC.

other regulated industries that antitrust immunity from damage actions does not extend to activities which frustrate the regulatory plan. There is nothing so difficult in ICC regulation of surface transportation as to call for application of a different standard.

4. The 1922 *Keogh* doctrine is directly inconsistent with the language of the Interstate Commerce Act as amended in 1948 and 1980.

5. The underlying rationale of the doctrine has been rejected by this Court.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATE: July 5, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 669 — August Term, 1984

(Argued: January 14, 1985 Decided: April 9, 1985)

Docket No. 84-7831

SQUARE D COMPANY and BIG D BUILDING SUPPLY CORP.,
Plaintiff-Appellants,

—against—

NIAGARA FRONTIER TARIFF BUREAU, INC.; BONDY CARTAGE LIMITED; DOMINION-CONSOLIDATED TRUCK LINES, LIMITED; ICL INTERNATIONAL CARRIERS LIMITED; INTER-CITY TRUCK LINES (CANADA), INC.; TNT CANADA, INC.,
Defendant-Appellees.

Before:

FEINBERG, *Chief Judge*, FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal from an order of the District Court for the Western District of New York, John T. Curtin, *Chief Judge*, 596 F. Supp. 153 (1984), dismissing, for failure to state a claim upon which relief can be granted, appellants' complaints under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, seeking damages and injunctive relief on the basis of allegations that defendants fixed motor carrier rates between the United States and Canada and engaged in other anticompetitive activities in violation of

the antitrust laws. Affirmed in part, reversed in part and remanded.

Douglas V. Rigler, Washington, D.C. (Linda H. Kamm, Michael Fischer, Foley & Lardner, Washington, D.C.; Joseph E. Zdarsky, Kavinoky & Cook, Buffalo, N.Y.), *for Appellant, Square D. Company*, (H. Laddie Montague, Alan M. Sandals, Berger & Montague, P.C., Philadelphia, Pa.; Arnold Levin, Howard Sedran, Levin and Fishbein, Philadelphia, Pa.), *for Appellant, Big D Building Supply Corp.*

Donald L. Flexner, Washington, D.C. (William Randolph Smith, Lisa B. Rovin, Crowell & Moring, Washington, D.C.), *for Appellee, Dominion-Consolidated Truck Lines, Limited* (Lester M. Bridgeman, Louis E. Emery, Bridgeman & Urbancyzk, Washington, D.C.), *for Appellee, Inter-City Truck Lines, (Canada) Inc.*, (Bryce Rea, Jr., Donald E. Cross, Rea, Cross & Auchincloss, Washington, D.C.; Sanford M. Litvack, Clark E. Walter, Donovan, Leisure, Newton & Irvine, New York, N.Y.), *for Appellee, Niagara Frontier Bureau, Inc.* (Peter A. Greene, Charles L. Freed, Thompson, Hine & Flory, Washington, D.C.), *for Appellee, ICL International Carriers Limited* (John W. Bryant, Eames, Wilcock, Mastej & Bryant, Detroit, Michigan), *for Appellee, Bondy Cartage Limited* (Peter D. Standish, Joel B. Harris, Weil, Gotshal & Manges, New York, New York), *for Appellee, TNT Canada, Inc.*

FRIENDLY, *Circuit Judge*:

This is an appeal from an order of the District Court for the Western District of New York, *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153 (1984), which dismissed appellants' complaints under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for failure to state a claim on which relief can be granted. The principal issue is whether *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), has been overruled so far as its language extends to rates filed with but not investigated and approved by the Interstate Commerce Commission ("ICC"), or, failing that, whether the reasoning underlying that language is so much in conflict with later developments that an inferior court should disregard it. While agreeing with appellants that much of the reasoning of *Keogh* seems outdated, we hold that its language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court. We therefore affirm the district court's principal ruling. However, we also hold that appellants' request for injunctive relief was prematurely dismissed and that appellants should be allowed to replead their damages claims, if they so choose and properly can, to allege injury they have suffered as a consequence of acts of the defendants other than the fixing of rates.

The case before us is a consolidation of two separately filed suits. Both appellants, who were plaintiffs below, are corporations that purchase from the defendants freight transport by motor carrier between the United States and Canada. Appellee Niagara Frontier Tariff Bureau, Inc. ("NFTB") is a rate bureau whose permissible activities are described in an agreement filed with and approved by the ICC. *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I.C.C. 494 (1955). The

other appellees are Canadian motor carriers engaged in the transportation of freight between the United States and Canada. Both complaints were brought on behalf of appellants individually and as representatives of a class comprised of all other persons and businesses who purchased from defendants freight transport between the United States and the Province of Ontario, Canada.

The complaints alleged substantially as follows:[1] Each of the motor carrier appellees was a party to the collective ratemaking agreement approved by the ICC for the NFTB, which authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada through authorized committees if the motor carriers adhered to the procedures set forth in the agreement and in ICC regulations. In accordance with the requirements of the Reed-Bulwinkle Act, 49 U.S.C. § 10706(b)(2)(B)(ii) (as amended), the rate bureau agreement preserved the right of each carrier to take independent action. The complaints alleged that at least as early as 1966 and continuing at least into 1981, appellees engaged in a conspiracy "to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC." More specifically, it was alleged that the appellees established a "Principals Committee" composed of the senior management officials

[1] Appellants' allegations are similar in many respects to those made in a civil antitrust action seeking injunctive relief later filed by the United States. A consent decree terminating that suit was entered on June 26, 1984. *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. June 26, 1984).

of the NFTB carriers that had authority to operate outside the Province of Ontario. Although this Committee did not have ICC authorization or approval to engage in rate-making, the appellants alleged that, through the Committee, appellees "engaged in the joint setting of rates and related policies and also agreed upon methods by which to inhibit competition for the transportation of freight by motor carrier between the United States and the province of Ontario, Canada;" set and controlled NFTB rate levels without complying with the notice, publication, public hearing or record keeping requirements of ICC regulations; planned "threats, coercion and retaliation" against NFTB member carriers for exercising the right of independent action and carried out such threats; and filed tariffs with the ICC in furtherance of the conspiracy. As a result of the conspiracy, appellants alleged, rates for the transportation of freight by motor carrier between the United States and Ontario were fixed at artificial and non-competitive levels, competition between and among the appellee motor carriers was restrained, competition generally in trade and commerce in the transportation of freight by motor service between the United States and Canada was suppressed, and purchasers of freight transport between the United States and Ontario were deprived of free and open competition. The injury suffered was alleged by Square D to be that shippers "have not been able to purchase transportation at rates determined by free and open competition and have been injured in their business and property in that they have paid more for motor freight transport between the United States and the Province of Ontario, Canada than they would have paid in a freely competitive market." Big D alleged substantially the same injury, although this was phrased in slightly different language. Appellants sought damages and injunctive relief.

Appellees moved, pursuant to F.R. Civ. P. 12(c) and 12(h)(2), for judgment on the pleadings as to appellants' claim for damages on the basis of *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Appellants contended that *Keogh* had been overruled by the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948), (current version at 49 U.S.C. § 10706), and also by the Supreme Court's decisions in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966) and *ICC* v. *American Trucking Ass'n*, 104 S. Ct. 2458 (1984). Disagreeing with this and going beyond the terms of the motion, Chief Judge Curtin did not limit his holding to the damages claims, and dismissed the complaints in their entirety. This appeal followed.

The Keogh opinion

In *Keogh*, a shipper of excelsior and flax tow brought an action under the Sherman Act alleging that rail carriers had restrained competition by combining to fix rates. The challenged rates had been duly filed by the carriers with the ICC and had been attacked there by shippers. The ICC suspended the tariffs pending investigation, but approved the new rates after extensive hearings in which Keogh participated; the challenged rates had not been made effective until after they had been so approved. The Supreme Court held that while the Interstate Commerce Act ("ICA") does not immunize regulated carriers from antitrust liability in Government proceedings, a private shipper may not recover treble-damages because he lost the benefit of lower rates which he would have enjoyed but for the conspiracy. 260 U.S. at 161-62. Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the Court said broadly that shippers could not re-

cover treble-damages for overcharges whenever tariffs have been filed. *Id.* at 163.

Justice Brandeis advanced four reasons for this result. The first, and most important, turns on the existence of a remedy in the ICA respecting rates. He began by stating that

> [a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce.

Id. at 162. He pointed out that under § 8 of the latter act, 49 U.S.C. § 8 (current version at 49 U.S.C. § 11705 (b)), the exaction of any rate that is illegal under the ICA makes the carrier liable to the person injured thereby for the full amount of damages together with a reasonable attorney's fee, recoverable either by complaint before the ICC or in an action in a federal court; thus if the conspiracy complained of in *Keogh* had resulted in rates which the ICC "found to be illegal because unreasonably high, or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings." *Id.* Justice Brandeis then propounded a rhetorical question:

> Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be

> legal and while in force had to be collected by the carrier?

Id. (citation omitted).

Justice Brandeis next developed a second, closely related argument. After reciting § 7 of the Sherman Act, which gives a right of action to one who has been injured in his business or property," he declared that

> [i]njury implies violation of a legal right. The legal rights of shipper as against carrier are measured by the published tariff. Unless and until suspended or set aside, this rate is made. for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. This "stringent rule" was thought necessary "because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated": if a shipper were allowed to recover under § 7 of the Sherman Act "for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id.* That each shipper might bring a similar action under § 7 failed to answer this concern, since "[u]niform treatment would not result, even if all sued. unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." *Id.*

Third, Justice Brandeis thought "[t]hat the character of the issues involved raises another obstacle to the maintenance of the action." The antitrust plaintiff could not prevail simply by proving "that some carrier would,

but for the illegal conspiracy, have maintained a rate lower than that published;" he also would have to prove "that the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce." *Id.* at 163-64. This was a question that must be determined by the ICC, at least in the first instance. Justice Brandeis dismissed the suggestion that this difficulty could be met by a court's suspending its proceeding pending reference to the ICC, saying that "by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination." *Id.* at 164.

Fourth and finally, Justice Brandeis found the plaintiff's damages to be purely speculative since all shippers of excelsior and tow were charged the same rates; hence, "[t]he benefit [of lower rates] might have gone to his customers, or conceivably, to the ultimate consumer." *Id.* at 164-65.

Evaluation of the Keogh opinion in the light of subsequent developments

Although the *Keogh* opinion has the "relentless quality" characteristic of Justice Brandeis,[2] many of his arguments do not seem so compelling today as they did in 1922. Passing the first argument for the moment and turning to the second, the fear that recovery of antitrust damages would operate "like a rebate" to produce dis-

[2] Friendly, *Mr. Justice Brandeis: The Quest for Reason*, 108 U. Pa. L. Rev. 985, 986 (1960), *reprinted in* Friendly, Benchmarks 291, 294 (1967). *See also* Professor Frankfurter's remark that Justice Brandeis' opinions "march step by step towards demonstration, with all the auxiliary reinforcement of detailed proof." Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 Harv. L. Rev. 33, 104 (1931).

crimination among shippers ignores the difference between a carrier's passing money under the table to a favored shipper and a court's deciding that a shipper had suffered antitrust injury. *See* Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751, 760 n.26 (1979). Such a distinction was recognized by the Court in the context of the Shipping Act in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), where the Court held:

> We believe that Congress was concerned with assuring equality of treatment by the [carriers], not with equality of treatment by juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.

Id. at 219 n.3. The argument that antitrust damages create discrimination contrary to the goals of the ICA is also inconsistent with the Court's recent holding in *I.C.C.* v. *American Trucking Ass'n*, 104 S. Ct. 2458, 2462 (1984) ("*ATA*") that

> [w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow.

Id. at 2462. Furthermore, the argument is scarcely applicable to class actions like these, a means of avoiding Justice Brandeis' concerns that was unavailable in actions at law in 1922. *See In re Wheat Rail Freight Rate Antitrust Litig.*, 579 F. Supp. 517, 535 (N.D. Ill. 1984);

F.R. Civ. P. 23, Notes of Advisory Committee; Wright, Federal Courts § 72 at 470-72 (4th ed. 1983).

Justice Brandeis' third reason, that an antitrust action would require the carrier to prove that a hypothetical lower rate conformed to the requirements of the ICA, seems even less compelling. The process in which the ICC would have to engage if a court requested it to determine whether lower rates produced by competition would be reasonable and non-discriminatory does not differ in essence from that which it must undertake in a reparations case, since damages under § 11705(b)(3) of the ICA are limited to the extent to which a tariff was unreasonable or discriminatory, *see ATA*, *supra*, 104 S. Ct. at 2463 n.5 (citing *Boren-Stewart Co.* v. *Atchison, T. & S.F. Ry.*, 196 I.C.C. 120, 125-26 (1933); *Spencer Plant Foods, Inc.* v. *Atlantic C.L.R.R.*, 302 I.C.C. 799, 800 (1958)). To the extent Justice Brandeis was concerned about the unprecedented nature of a proceeding in which the ICC answered only the question whether a particular lower rate would have been reasonable and non-discriminatory without issuing a final order of its own, a concern consistent with his aversion to advisory opinions and declaratory judgments, *see, e.g.*, *Willing* v. *Chicago Auditorium Ass'n*, 277 U.S. 274, 288-90 (1928), this concern has been overcome in the many later cases in which the Supreme Court has directed the suspension of judicial proceedings pending the referral of similar issues to the ICC. *See, e.g., United States* v. *Western Pac. R.R.* 352 U.S. 59, 62-70 (1956) (construction and reasonableness of tariff referred to ICC in Tucker Act claim); *Southwestern Sugar & Molasses Co.* v. *River Terminal Corp.*, 360 U.S. 411, 420-22 (1959) (validity of contract clause referred to ICC in libel action); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 203-06 (1960) (construction and reasonableness of tariff

referred to ICC in action under ICA); *see also United States* v. *Associated Transp., Inc.*, 505 F.2d 366, 369 (D.C. Cir. 1974) (in exercising its exclusive jurisdiction to award reparations under 49 U.S.C. § 304a(5), court must allow ICC to determine what would have been the "just and reasonable" rate); *cf. Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-99 (1958) (legality of dual-rate system referred to Federal Maritime Board to pass on initially). *See generally* 4 Davis, Administrative Law Treatise, ch. 22 (2d ed. 1984).

Justice Brandeis' fourth reason, that "no court or jury could say that, if the rate had been lower, [the shipper] would have enjoyed the difference" since the benefit "might have gone to his customers," 260 U.S. at 165, is still less persuasive in view of later developments. Justice Brandeis himself was to hold in a suit alleging that unreasonably high rates were charged under the ICA that the possibility that a plaintiff had recouped overcharges from his customers was irrelevant in assessing damages. *Adams* v. *Mills*, 286 U.S. 397, 406-08 (1932); *see also Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, J.). The Supreme Court has also rejected the argument that a plaintiff cannot recover damages it was able to pass on to its customers in the antitrust context. *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 487-94 (1968); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 723-26 (1977). Indeed, in *Hanover Shoe*, the defendant relied on *Keogh* for its argument that plaintiff could not recover any damages; the Court labeled the damages argument made in *Keogh* "dictum" since, in the Court's view, the shipper there was held to have no cause of action under the antitrust laws "[b]ecause the rates had been approved

as reasonable after a proceeding before the Interstate Commerce Commission . . . ." 392 U.S. at 491 n.8. The Court then went on to say, "[w]e ascribe no general significance to the *Keogh* dictum for cases where the plaintiff is free to prove that he has been charged an illegally high price." *Id.*

Even the first reason expressed for the result in *Keogh* no longer seems so self-evident as Justice Brandeis thought. Why is a rate "not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act?" Justice Brandeis had recognized in the preceding paragraph of his opinion that a combination of carriers "to fix reasonable and non-discriminatory rates may be illegal." 260 U.S. at 161-162 (citing *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States* v. *Joint-Traffic Ass'n*, 171 U.S. 505 (1898)). Moreover, it has long been recognized that "[a] zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935). Why then should the shipper's ability to recover the excess of an unreasonable over a reasonable rate under the ICA preclude him from recovering the excess of a reasonable (and *a fortiori* an unreasonable) rate over the lower but still reasonable rate that would have prevailed under free competition? Since *Keogh*, the Supreme Court has held that implied exemptions to antitrust liability are "strongly disfavored." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). The Court has subsequently found that activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity. *See, e.g., Silver* v. *New York Stock Exchange*, 373 U.S. 341,

357-60 (1963) (no exception found for rules subject to SEC disapproval promulgated by exchanges). Indeed, the Court has reached this result even where the agency is empowered to grant a remedy or agency approval has actually been obtained, and notwithstanding the fact that the agency considers effects on competition under the statutory scheme. *See, e.g., United States* v. *Philadelphia Nat'l Bank, supra*, 374 U.S. at 351-52 (approval of bank merger by Comptroller under Bank Merger Act does not impliedly exempt parties from antitrust laws); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-75 (1973) (available remedy before Federal Power Commission for refusal to sell power does not preclude remedy under antitrust laws).[3] In other words, it seems quite possible

[3] The companion cases of *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), and *United States* v. *NASD*, 422 U.S. 694 (1975), may be read to suggest a more stringent rule, namely, that merely entrusting an agency with authority over challenged activity requires exempting that activity from antitrust liability to avoid subjecting regulated entities to "duplicative and inconsistent standards." 422 U.S. at 735. However, there need be no "duplicative and inconsistent standards" in the context of rates for transport inasmuch as the ICC's conclusion that a rate is within the "zone of reasonableness" and the antitrust court's conclusion that the rates were unlawfully fixed at too high a price within this range do not conflict. Moreover, these decisions appear to require that the challenged practice have obtained some kind of stamp of approval from the agency through the agency's active exercise of —or deliberate choice not to exercise—its regulatory authority. *See Gordon*, 422 U.S. at 668-82, 689-91; *NASD*, 422 U.S. at 728, 730-35. Only a very small percentage of tariffs filed with the ICC are investigated because the sheer volume of filings makes investigation of the vast majority impossible. *Cf. ATA, supra*, 104 S. Ct. at 2463 n.4 (the ICC reviews "only a random sampling of tariff filings, and tariffs with obvious defects are allowed to go into effect"); 97 ICC Ann. Rep. 71-73 (1983) (1.2 million filings, 188 examinations, 11 suspensions); 96 ICC Ann. Rep. 70-73 (1982) (over 900,000 filings, 366 examinations, 30 suspensions). Consequently, the investigation and approval or disapproval by the ICC of a small fraction of the tariffs filed would not seem to signify regulatory approval by the Commission of uninvestigated tariffs like those challenged here.

to answer the first of Justice Brandeis' rhetorical questions and perhaps—although that issue is not presented here—even the second, with a "Yes" rather than with the "No" he thought to be inexorably demanded.

The case for reaching a contrary conclusion today to that reached by Justice Brandeis is particularly strong in the light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates. *See Otter Tail Power Co.* v. *United States, supra*, 410 U.S. at 374 (emphasizing as a reason not to find an implied exemption to antitrust liability that the regulatory statute "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.") In the last decade, Congress has passed six major pieces of legislation "aimed at increasing competition and reducing unnecessary federal regulations" in the transportation industry. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2285 (accompanying Motor Carrier Act of 1980). These are the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (1980); the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982). Exposing ratemaking to competitive forces to as great an extent as possible was among the most significant aspects of this deregulation. H.R. Rep. No. 1069, *supra*, at 3-4, 1980 U.S. Code Cong. & Ad. News at 2285-86 (Motor Carrier

Act); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 33-34, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3978-79 (Staggers Rail Act). For example, § 11 of the Motor Carrier Act of 1980, the most directly relevant legislation here, added subsection (d) to 49 U.S.C. § 10708. This bars the Commission from interfering with a rate proposed by individual carriers on the basis that it is too high or too low if the rate is within 10 percent of the rate one year prior to the effective date of the new rate. Paragraph (4) (redesignated 49 U.S.C. § 10708 (d)(6) by the Bus Regulatory Reform Act) provides that rates implemented pursuant to this subsection "shall be subject to the antitrust laws" except that they may be jointly docketed and published pursuant to carrier agreements approved under 49 U.S.C. § 10706. The House Report accompanying the bill explains:

> The thrust of this new subsection is to provide for more pricing freedom and less government regulation and to balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing. Plainly, the intent is to give the carriers and the shipping public the ability to structure their transportation systems and needs around a variety of service and price options. Another anticipated impact is that, by separating the new pricing flexibility from collective ratemaking with its attendant antitrust immunity, the carriers will establish many of their rates independently of one another. This will create a more competitive motor carrier system.

H.R. Rep. No. 1069, *supra*, at 25, 1980 U.S. Code Cong.

& Ad. News at 2307.[4] In a case involving anticompetitive activities after October 1, 1980, the effective date of the Motor Carrier Act of 1980, the change effected by that statute would have to be taken into account. However, appellants have not asked us to treat their claims arising after October 1, 1980 differently from those arising before that date; they have argued rather that passage of the Motor Carrier Act of 1980 "again confirmed" the fact that the *Keogh* doctrine had already been overruled.

Has Keogh been overruled by statute or Supreme Court decision?

Appellants acknowledge, as they must, that the Supreme Court has not expressly overruled *Keogh;* indeed, *Keogh* was reaffirmed and applied to damages claims concerning rates that had been filed with but had not been approved (or disapproved) by the ICC in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453 (1945). Little over a year ago it was applied in *Minsky* v. *Auto Driveway Company*, 734 F.2d 18 (7 Cir. 1984), *cert. denied*, 105

[4] Even more significant restrictions were imposed upon the authority of the ICC to regulate rate competition among rail carriers. Rail carriers may now establish any rate for transportation or other services unless the ICC determines that a carrier has "market dominance" respecting the transportation to which a particular rate applies. 49 U.S.C. § 10701a. A difficult test must be met by a shipper wishing to show that a carrier has such dominance. *See* 49 U.S.C. §§ 10707, 10709. Reese Taylor, Chairman of the ICC, explained to the Congress that the Staggers Rail Act "[b]asically . . . eliminates rate regulation where there is effective competition." Statement of Reese H. Taylor, Jr., Chairman, ICC, Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce on Implementation of the Staggers Rail Act of 1980 at 16 (July 27, 1983). Indeed, one commentator has suggested that, under the Staggers Rail Act, Mr. Keogh no longer would have the remedy before the ICC that was so central to Justice Brandeis' opinion. F. Kahn, *Keogh's Kaput*, 49 I.C.C. Prac. J. 478, 483-84 (1982).

S. Ct. 435 (1984). It has frequently been cited by the Supreme Court with apparent approval. *See United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 485 (1932) (courts will leave matters for which express agency remedy under Shipping Act exists to the agency); *Far East Conf.* v. *United States*, 342 U.S. 570, 574 (1952) (quoting *Cunard* and applying it to a Government suit); *United States* v. *RCA*, 358 U.S. 334, 347-48 (1959) (under pervasive regulatory scheme courts must defer to agency's primary jurisdiction); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 310 (1963) (Aviation Act leaves to CAB all questions of injunctive relief respecting route allocation); *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 351 & n.29 (implied repeal of antitrust laws in cases of "plain repugnancy between antitrust laws and regulatory provisions"); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260 (1972) (citing *Keogh* to explain holding in *Georgia* v. *Pennsylvania R.R.*); *Ricci* v. *Chicago Mercantile Exch.*, 409 U.S. 290, 299-300 & n.12 (1973) (citing *Keogh* as an example of the "recurring problem" of conduct seemingly within the reach of both antitrust laws and other regulatory statutes); *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (court may have jurisdiction over antitrust action even though remedies are limited to injunctive relief). *But see Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, *supra*, 392 U.S. at 491 n.8 (shipper in *Keogh* had no cause of action "[b]ecause the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission").[5] No decision of this or any other circuit

[5] Appellants have not argued that footnote 8 in *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, *supra*, limited *Keogh* to cases where the challenged rates had been approved. Indeed, *Hanover*

[Footnote continued on following page]

has treated *Keogh* as having been overruled with respect to rates for transportation or other services that have been filed with an appropriate federal agency as required by law except when, as in *Essential Communications Sys. Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114, 1121-24 (3 Cir. 1979); *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2 Cir. 1981), and *Litton Sys., Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785, 820 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984), the agency has itself raised questions regarding the lawfulness of the rates. All these cases, moreover, were suits by competitors rather than users of the service, so that many of the considerations relied upon in *Keogh* would not apply. *See Essential Communications*, *supra*, 610 F.2d at 1122. Nevertheless, appellants have presented arguments challenging the current status of *Keogh* that, although they must ultimately be rejected, warrant detailed consideration.

Appellants' contention that *Keogh* has been overruled by statute rests principally on the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706), which authorized the formation of joint associations of carriers upon approval by the ICC and granted full immunity from the antitrust laws (as contrasted with the freedom from private suits by shippers for treble-damages recognized in *Keogh*) with respect to making or carrying out approved agreements. This argument appears neither to have been advanced nor considered in cases citing *Keogh* with approval decided

[Footnote continued from previous page]

Shoe is not referred to in any of the briefs. Seemingly the footnote was addressed only to Justice Brandeis' fourth reason. We hesitate to believe that this footnote reference was meant to overrule an opinion which had been and continues to be so widely cited and applied.

since 1948. The legislative history of the Reed-Bulwinkle Act, however, refutes the contention that Congress intended to overrule the *Keogh* doctrine in enacting that legislation.

The practice of forming organizations of carriers to facilitate joint action by participating members long antedated the Reed-Bulwinkle Act. *Keogh* itself dealt with such an organization. *See* 260 U.S. at 159-60. These organizations offered a practical means of dealing with the many matters, among the most important of which was ratemaking, as to which coordinated action was felt necessary. *See* H.R. Rep. No. 1100, 80th Cong., 2d Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1849-54 (accompanying Reed-Bulwinkle Act). In its 1898 Annual Report, the ICC concluded that "to one familiar with actual conditions it seems practically out of the question to establish rates that are relatively just without conference and agreement." 12 ICC Ann. Rep. 15-16 (1898). Similarly, the House Report accompanying the Reed-Bulwinkle Act. which repeats the Senate Report and incorporates additional material, concluded:

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder, and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent.

H.R. Rep. No. 1100, *supra*. 1948 U.S. Code Cong. & Ad. News at 1847.

Nonetheless, legislation according express antitrust immunity to joint activity by land carriers was slow in

coming. Transportation Act, 1920, Pub. L. No. 66-152, 41 Stat. 456, 480, 482, provided immunity from the antitrust laws for approved agreements respecting certain kinds of transactions, such as poolings, divisions, consolidations, mergers. acquisitions and the like, but failed to immunize many of the most important activities requiring joint agreements, such as ratemaking and establishing through routes and joint rates.[6] Congress failed to immunize these activities earlier because for many years legislation was not deemed necessary. As the House Report on the Reed-Bulwinkle Act explains, joint carrier organizations had been operating openly with the full knowledge of the ICC, state regulatory bodies, shippers and others involved in the transportation industry. H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1846. In many instances, joint ratemaking associations were "maintained with the approval and cooperation of the shippers . . . and [were] encouraged by the Commission and various other agencies and departments of the Government as both necessary and desirable. In fact, various departments and agencies of the Government . . . frequently utilized them to advantage." *Id.* Commissioner Clyde Aitchison of the ICC testified that during the early decades of the century both the Department of Justice and the courts understood that joint ratemaking by common

[6] The limited immunity granted to land carriers for approved transactions in Transportation Act, 1920, was amended, but not expanded, by the Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 905. By contrast, Congress provided a broad exemption from antitrust liability for water carriers whose agreements were approved by the United States Shipping Board (now the Federal Maritime Commission) under the Shipping Act of 1916, 46 U.S.C. § 814, and for air carriers whose agreements were approved by the Civil Aeronautics Board under the Civil Aeronautics Act of 1938, 49 U.S.C. § 492 (repealed and reenacted in 1958 as 49 U.S.C. § 1382). These provisions were relied upon by Congress as precedents for the Reed-Bulwinkle Act. H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1848-49.

carriers was necessary to the operation of the transportation system and did not challenge this activity under the antitrust laws as long as carriers preserved their right of independent action. *See Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce*, 79th Cong., 2d Sess. 1133-48 (1946) [hereinafter cited as 1946 Senate Hearings]. However, in the early 1940's, the Department of Justice began to question the legality of the cooperative activities of the carriers. Officials of the Department pointed out that there was a range of "reasonable" rates under the ICA and maintained that joint ratemaking needlessly kept rates at the upper end of this range in contravention of the policies underlying the antitrust laws. *See* 1946 Senate Hearings, *supra*, at 556-90 (testimony of Arne Wiprud, former Chief of Transportation Section, Antitrust Division, Department of Justice), 744-67 (testimony of Wendell Berge, Assistant Attorney General); *Hearings on S. 110 Before the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 65-81 (1947) (testimony of Wendell Berge) [hereinafter cited as 1947 Senate Hearings]; *Hearings on H.R. 221 and S. 110 Before the House Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 174-75 (1947) (testimony of Albert Boggess, Special Assistant to the Attorney General) [hereinafter cited as 1947 House Hearings]. This policy shift manifested itself in the form of a series of suits brought by the Department of Justice against carrier organizations:

> Efforts at Chicago in 1942 to indict certain railroads, motor carriers, and others under the antitrust laws for participating in those activities were stopped because it was believed that such prosecution would seriously interfere with the war effort. Early in 1943 an indictment under the antitrust laws of certain

> motor carriers and motor carrier rate associations was returned at Denver and, after trial, all of the defendants were acquitted by the verdict of a Federal court jury. In 1943 a certificate was issued by the Chairman of the War Production Board declaring rate bureaus and similar carrier organizations to be requisite to the prosecution of the war. In 1944 an injunction suit under the antitrust laws was brought by the Department of Justice in the United States District Court for the District of Nebraska against the western railroads and the Association of American Railroads and others to enjoin them from carrying on various cooperative activities . . . .

H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1846. In addition, in 1944 the State of Georgia filed a suit in the Supreme Court as *parens patriae* alleging rate-fixing by eastern and southern railroads. This suit led to the opinion in *Georgia* v. *Pennsylvania R.R.*, *supra*, where the Court dismissed the damages claims on the authority of *Keogh* but went on to hold that the State could maintain a suit to enjoin the alleged rate-fixing conspiracy since "that is a matter over which the Commission has no jurisdiction." *Id.* at 455. The suit was still pending on its merits during the deliberations over the Reed-Bulwinkle Act.

These suits, together with the expiration of the War Production Board's certificate of exemption in 1946, provided the immediate impetus for the enactment of the Reed-Bulwinkle Act. *See* H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1847; *cf.* 1947 Senate Hearings, *supra*, at 6 (testimony of J. Monroe Johnson, Director, Office of Defense Transportation). Congress was concerned with the effect of such antitrust actions on transportation policy: a recurring theme in the testimony at the hearings was that antitrust suits might

conflict with the national transportation policy manifested in the ICA. *See, e.g.*, 1946 Senate Hearings, *supra*, at 365-70 (testimony of Sam B. Winn, Chairman, Western Conference Commission), 1171-72 (testimony of Clyde Aitchison, Commissioner, ICC); 1947 House Hearings, *supra*, at 9-11 (statement of Frederick Hamley, General Solicitor, NARUC). Congress recognized that it could not by legislation deal with each instance of joint action by carriers to resolve whatever conflict may exist between the principles of the antitrust laws and the national transportation policy. H.R. Rep. No. 1100, *supra*, 1948 U.S. Cong. & Ad. News at 1848. Rather, in the words of the House Committee:

> The only practical approach to the problem is to grant to a competent administrative agency, as is proposed in the bill, the authority to resolve the conflict in specific instances of proposed joint action by carriers.
>
> Since this problem arises in the relatively circumscribed field of transportation, the agency which is peculiarly well qualified to exercise this authority is the Interstate Commerce Commission. The bill here reported, therefore, places this responsibility upon that Commission.
>
> *The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body* upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

Id. (emphasis added).

Appellants argue that the Reed-Bulwinkle Act was intended to be a comprehensive regulation of rate-making agreements: If the carriers acted within the terms of an approved agreement their conduct would be immunized from all antitrust liability, including the proceedings for redress by injunction and criminal prosecution left open by *Keogh* as interpreted in the *Georgia* case; on the other hand, if they acted pursuant to an unapproved agreement or without complying with the terms of an approved agreement, they were to be subject to damages liability, *Keogh* notwithstanding. There would be some force in this contention if the Committee Report had said merely "[t]he bill leaves the antitrust laws to apply with full force and effect to carriers . . . except," etc. However, the Committee was at pains to insert the qualifying phrase "so far as they are now applicable." *Keogh* had ruled that the antitrust laws were not applicable so as to allow shippers to maintain suits for damages resulting from filed tariffs. Beyond this, the legislative history contains no suggestion of any intention to overrule *Keogh*, and it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect.

This silence in the legislative history is particularly significant in that the Congress that enacted the Reed-Bulwinkle Act was undoubtedly familiar with the *Keogh* doctrine. *Keogh* had been expressly reaffirmed and applied in the *Georgia* case, which received extensive and detailed consideration in the hearings: more than a dozen witnesses testified about the case, and the opinion of the Supreme Court was made a part of the Committee record; indeed, Arne Wiprud, formerly of the Antitrust Division of the Department of Justice, read to the Committee the passage from the Supreme Court's opinion reaffirming the

limitation on shippers' rights to recover treble-damages. 1946 Senate Hearings, *supra*, at 581. Several other witnesses discussed the *Keogh* decision itself. Wendell Berge, then the Assistant Attorney General in charge of the Antitrust Division, read passages from the opinion to the Committee, including the passage recognizing an exception for antitrust liability in Government proceedings. 1946 Senate Hearings, *supra*, at 799; *see also* 1947 Senate Hearings, *supra*, at 73. Commissioner Aitchison, the importance of whose testimony is underscored by its having been quoted at length in the Committee Reports, ended his explanation of the history of rate regulation and the antitrust laws with a discussion of the *Keogh* and *Georgia* cases. He explained to the Committee that "the net result of the Keogh decision," which was "to limit the force of section 7 of the Sherman Act, as related to wrongs for which there was a money-damage remedy afforded under the Interstate Commerce Act," did not go far enough because it left open the possibility of proceedings by the Government. 1946 Hearings, *supra*, at 1148-49. He urged the Congress to extend antitrust immunity to Government and private injunction actions challenging agreements that had been approved by the ICC. No one suggested, however, that *Keogh* should be overruled, and there is no basis under the circumstances to infer that Congress intended to do so by implication, particularly since neither the purposes nor the operation of the *Keogh* doctrine and the Reed-Bulwinkle Act conflict.

The immunity established in 1948 in the Reed-Bulwinkle Act remained, with modifications not relevant here, until 1980. In that year, Congress passed the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (the "1980 Act"). Section 14, 49 U.S.C. § 10706, revised the requirements for a carrier to obtain immunity from

antitrust liability and limited the scope of the available immunity. Appellants do not argue that this legislation overruled *Keogh*, but assert only that "[p]assage of the Motor Carrier Act of 1980 . . . again confirmed that antitrust immunity is conditioned upon compliance with a Congressionally approved regulatory plan." As discussed above, the Reed-Bulwinkle Act had no such effect with respect to the *Keogh* doctrine; a brief review of the legislative history confirms that this conclusion applies as well to the 1980 Act.[7]

The immunity from the antitrust laws granted in the Reed-Bulwinkle Act was among the chief concerns in the debates over the 1980 Act. According to the House Report, "[n]o issue has received more attention during the debate before the Committee than whether this immunity should be allowed to continue. The debate centered on whether there continues to be a reasonable public quo in return for the collective ratemaking quid of the Reed-Bulwinkle Act." H.R. Rep. No. 1069, *supra*, at 27, 1980 U.S. Code Cong. & Ad. News at 2309. After extensive hearings conducted over a two-year period, the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee proposed eliminating antitrust immunity for

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[7] It is not entirely clear that the 1980 Act even applies to the facts of this case. The complaint alleges that the illegal conspiracy began "at least as early as 1966 and continue[d] at least until 1981." Although the 1980 Act became effective on October 1, 1980, the House Report acknowledges that:

> [m]ost likely, rate bureau agreements now in existence will not meet the new requirements of this section. Plainly, a transition period is needed during which these agreements remain in effect until the bureaus can comply with this section. This is the intent of the Committee.

H.R. Rep. No. 1069, *supra*, at 30, 1980 U.S. Code Cong. & Ad. News at 2312. Since we conclude that the 1980 Act does not overrule *Keogh*, we need not address this question.

all collective ratemaking, although it recommended retaining immunity for joint tariff publication and interline arrangements. *Committee on the Judiciary, 96th Cong., 2d Sess., Federal Restraints on Competition in the Trucking Industry: Antitrust Immunity and Economic Regulation* 151 (Comm. Print 1980); *see also id.* at 45-69, 145-51. The ICC, on the other hand, urged more modest revisions, in particular the withdrawal of immunity for joint agreements respecting individual carriers' single-line rates. *See Motor Carrier Act of 1980: Hearings on S. 2245 Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 1509, 1865-68 (statement of Darius Goskins, Chairman, ICC). Representatives of other organizations made various recommendations for retaining the Reed-Bulwinkle Act, revising it in minor ways or substantially altering it. *See id. passim.* The predominant opinion was critical of the existing rate bureau process and recommended that the immunity it enjoyed from the antitrust laws be curtailed substantially; Congress acquiesced in this. S. Rep. No. 641, 96th Cong., 2d Sess. 13-15 (1980). As finally passed, the 1980 Act significantly revised the antitrust immunity provided in the Reed-Bulwinkle Act. *See* H.R. Rep. No. 1069, *supra*, at 29-30, 1980 U.S. Code Cong. & Ad. News at 2311-12 (summarizing scope of permissible collective ratemaking). However, no mention appears to have been made of *Keogh*, and apart from the particular changes made by § 10706 Congress did not expand antitrust liability beyond that which existed under the Reed-Bulwinkle Act.

Appellants' strongest argument that the Supreme Court has overruled *Keogh*, albeit *sub silentio*, is based on *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966). Carnation, a shipper in foreign commerce, alleged that the Pacific Westbound Conference, an association of

carriers by water approved under the Shipping Act by the Federal Maritime Commission ("FMC"),[8] increased the rate for shipping evaporated milk pursuant to an agreement with the Far East Conference, another approved association. The rates had been filed with the FMC as required by 46 U.S.C. § 817(a); however, at the time the events alleged occurred, the Shipping Act also provided:

> Every common carrier by water . . . shall file immediately with the Federal Maritime [Commission] a true copy . . . of every agreement, with another such carrier . . . fixing or regulating transportation rates or fares . . . .
>
> . . . .
>
> All agreements, modifications, or cancellations made after the organization of the [Commission] shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.
>
> Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of [the antitrust laws] . . . .

46 U.S.C. § 814 (1958). Carnation alleged that Pacific Westbound and Far East agreed, without obtaining FMC

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[8] The United States Shipping Board was created in 1916 to enforce the Shipping Act. Its functions were transferred in succession to the United States Shipping Board Bureau in 1933, the United States Maritime Commission in 1936, the Federal Maritime Board in 1950, and, finally, the Federal Maritime Commission in 1961. We will refer throughout to the last of these, although some of the developments described in the text involved an agency with a different name.

approval, to surrender their right to take independent action and that Pacific Westbound maintained the increased rate only because Far East would not agree to its being lowered. This conduct, Carnation contended, forfeited the express immunity from antitrust liability provided in § 814 and was unlawful *per se* under the antitrust laws.

The carriers argued that the Shipping Act repealed all antitrust regulation of ratemaking activities of the shipping industry and that the exclusive remedy for shippers aggrieved by carriers' rates was before the FMC. The carriers relied for this argument on *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 483-88 (1932), where the Court affirmed the dismissal of an antitrust action to enjoin a dual-rate system because the FMC had primary jurisdiction, and *Far East Conf.* v. *United States*, 342 U.S. 570, 576-77 (1952), where the Court applied *Cunard* to bar a similar challenge by the United States as shipper. Carnation argued that these cases were distinguishable on the ground that the plaintiffs there sought an injunction that would have interfered with the FMC's performance of its functions respecting the conduct challenged. The carriers responded that the doctrine that an administrative remedy supersedes antitrust remedies originated in a treble-damages action, citing *Keogh*, which, they pointed out, was relied on in *Cunard* and *Far East*.

The Supreme Court rejected the argument that the Shipping Act displaced the antitrust laws entirely and held that "the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws." 383 U.S. at 216. The Court reasoned that Congress would not have

created an expressly limited immunity such as the one found in § 814 if it had intended to immunize the industry completely from antitrust liability. *Id.* at 216-20. *Cunard* and *Far East* were distinguished on the ground that these cases "merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission." *Id.* at 220. However, *Cunard* and *Far East* "permit courts to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." *Id.* at 221. An award of treble-damages for past and completed conduct which clearly violated the Shipping Act would not interfere with the authority of the FMC, *id.* at 222, although to avoid conflict with the agency, the question whether the conduct challenged clearly violated the Shipping Act (in *Carnation* this depended upon whether the rates were filed pursuant to approved or unapproved agreements) did require preliminary resort to the FMC, *id.* at 222-23. Accordingly, the Court directed that the action be stayed pending the conclusion of proceedings before the agency, with instructions to allow the suit to proceed if the FMC found that the agreements were not approved. *Id.* at 223-24.

The Court did not refer to *Keogh* in its opinion. Since, as appellants argue here, the result in *Carnation* appears on its face to conflict with the holding in *Keogh* that filed tariffs define the legal rights between shipper and carrier "unless and until disapproved" by the agency, they deem this omission to imply that the Court intended to overrule *Keogh* but for some reason was unwilling to say so. We think it more plausible that, if the Court in-

tended to overrule *Keogh* or even seriously to question that decision, it would have discussed or at least mentioned the fact. Moreover, a sound basis existed for distinguishing *Keogh* and finding, as the Court apparently did, that the filing of tariffs under the Shipping Act does not limit the rights of shipper vis-a-vis carrier.

As has been pointed out above, in the years after *Keogh* was decided, implied exemptions to the antitrust laws fell into strong disfavor. By the time *Carnation* was decided in 1966, the necessity of implying a repeal of the antitrust laws was measured by the pervasiveness of the regulation of the industry in question and the authority of the regulatory agency to perform the antitrust function of regulating competition with respect to the challenged practice. *See* Hale & Hale, *Mergers in Regulated Industries*, 59 Nw. U.L. Rev. 49, 54-56 (1964); Note, *The Antitrust Immunity Doctrine and United States* v. *National Association of Securities Dealers: Stepping on Otter Tail*, 28 Hastings L.J. 387, 388-89 396-411 (1976); *e.g.*, *United States* v. *RCA*, 358 U.S. 334, 346-52 (1959) (no repeal for broadcasters under Communications Act of 1934); *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 347, 357-65; *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 348-52. Compared to the ICA, the Shipping Act is a very limited regulatory scheme. It imposes only a few general duties, and the central purpose of the statute was to provide for industry self-regulation through agreements between carriers under the aegis of the FMC, which was to approve or disapprove these agreements with an eye to the prevention of certain practices deemed unjustly or unfairly discriminatory. 46 U.S.C. §§ 811-816; *see Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 487-91 (1958); *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 241-43

(1968); Report of the Antitrust Division, Department of Justice, *The Regulated Ocean Shipping Industry* 34-35 (1977) [hereinafter cited as DOJ Report]; Note, *Antitrust and the Shipping Industry: Interpretation of the Shipping Act of 1916*, 12 N.Y.U. J. Int. L. & Pol. 115, 116-20 (1980). The ICA and the Shipping Act differ significantly with respect to the relative powers of the ICC and the FMC concerning rate regulation. As the Senate Report accompanying the 1961 amendments to the Shipping Act noted, "[w]hereas Congress has vested rate control powers and responsibilities in Government regulatory agencies concerned with domestic surface and air transportation, it has heretofore given to the maritime regulatory agencies no similar mandate over international shipping rates." S. Rep. No. 860, 87th Cong., 1st Sess. 5 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 3108, 3112; *see also Federal Maritime Bd.* v. *Isbrandtsen Co.*, *supra*, 356 U.S. at 490-91; 1947 Senate Hearings, *supra*, at 593-94 (statement of Arne Wiprud) (arguing that the Shipping Act is not a valid precedent for the Reed-Bulwinkle Act).[9] Although the FMC can and does take effects on competition into account in approving conference agreements under 46 U.S.C. § 814, *see Federal*

[9] The Alexander Report, which led to the enactment of the Shipping Act and which was carefully considered by the Supreme Court in *Carnation*, *see* 383 U.S. at 218-19, acknowledged that "the steamship business differs essentially from that of the railroads" as regards the desirability of rate regulation. H.R. Doc. No. 805, 63d Cong., 2d Sess. 420 (1914) [hereinafter cited as Alexander Report]; *see also* H.R. Rep. No. 659, 64th Cong., 1st Sess. 30 (1916) (accompanying the Shipping Act of 1916 and incorporating findings of the Alexander Report); S. Rep. No. 860, *supra*, at 25, 1961 U.S. Code Cong. & Ad. News at 3132 ("Your committee finds, however, that it would be a serious mistake at this time in world affairs for the U.S. Government unilaterally to assert by statute such a bold claim of right to sit in judgment of the 'reasonableness' of international freight rates.")

Maritime Comm'n v. *Aktiebolaget Svenska Amerika Linien*, *supra*, 390 U.S. at 243-46; *Mediterranean Pools Investigation*, 9 F.M.C. 264, 288-90 (1966), the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the statutory scheme was designed to minimize the role of the FMC in this regard. *See* DOJ Report, *supra*, at 61-62 & n.143. The FMC has only "limited ratemaking authority" over foreign commerce, *id.* at 37, 47, and, consequently, its ability to award reparations is also circumscribed, *cf.* 46 U.S.C. § 821(a). After a hearing it may disapprove a rate that it finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5). However, the Commission is without power to establish a new "reasonable" rate and can only require the conference or carrier to file a more acceptable one. The FMC's sole ratemaking power is the power to alter rates "to the extent necessary to correct . . . unjust discrimination or prejudice" towards shippers or ports under 46 U.S.C. § 816. Unlike the ICC, the FMC cannot establish through routes, joint classifications and joint rates, and cannot suspend a proposed tariff.[10] *See* Fair & Guandolo, Transportation Regulation 46-47, 200-209 (7th ed. 1972); DOJ Report, *supra*, at 36, 47. Thus, the pervasive authority of the ICC respecting the rates and business of carriers under its jurisdiction is absent from transportation subject to the more limited scrutiny of the FMC. *See In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235, 1241 (S.D.N.Y. 1980) (distinguishing *Keogh* because

[10] In 1979, the FMC was given the limited power to suspend tariffs, subject to disapproval by the President, in connection with an investigation into illegal rebating by a carrier. *See* Shipping Act Amendments of 1979, Pub. L. No. 96-25, § 5, 93 Stat. 71, 72 (codified at 46 U.S.C. § 821(c)(2), (4)).

"[t]he FMC wields relatively weak power to supervise tariffs").[11]

Appellants' reliance on *ATA*, *supra*, 104 S. Ct. 2458, has even less force. The Court there was called upon to decide whether the ICC could declare effective tariffs that later investigation revealed to have been agreed upon in violation of section 14 of the 1980 Act, 49 U.S.C. § 10706, retroactively ineffective. This would entitle shippers to rates as if the unlawful tariff had never existed and thus require the carriers to pay reparations equal to the excess of what the carriers actually collected over the rates in effect prior to those declared unlawful. Such a remedy would often expose carriers to damages liability greatly in excess of their potential liability in an action before the ICC under § 11705(b)(3), which is limited to the extent to which an unlawful tariff was unreasonable or discriminatory and which thus gives the carrier the full benefit of the available range of lawful rates. The carriers argued that this new remedy was unnecessary because

[11] The limited authority of the FMC under the Shipping Act stands in contrast not only to the powers and duties of the ICC respecting land carriers, but also to the equally extensive authority conferred upon the ICC to regulate domestic shipping in the Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 929-952, which added title III to the Interstate Commerce Act and restricted the jurisdiction of the FMC over domestic waterborne commerce to the offshore trade between the United States and the territories. *See* H.R. Rep. No. 1217, 76th Cong., 1st Sess. 21-26 (1939); H.R. Conf. Rep. No. 2016, 76th Cong., 3d Sess. 76-78 (1940). *See also* Act of July 7, 1958, Pub. L. No. 85-508, § 27(b), 72 Stat. 339, 351 (Alaska statehood bill preserving FMC jurisdiction over trade with Alaska); Act of March 18, 1959, Pub. L. No. 86-3, § 18(a), 73 Stat. 4, 12 (Hawaii statehood bill preserving FMC jurisdiction over trade with Hawaii). In its brief, Carnation argued, persuasively it seems, that *Keogh* should be limited to the pervasive regulatory schemes enforced by the ICC and not applied to water carriage subject to the much less intrusive supervision of the FMC under the Shipping Act. *See* Petitioner's Brief at 43-48, *Carnation*, *supra*.

suits under § 11705(b)(3) and antitrust damages created adequate disincentives to the filing of unlawful tariffs; the ICC disagreed, and the Court sided with the Commission. *Keogh* was not mentioned in the opinion and was only cited twice in the briefs for minor propositions.[12] The Court clearly assumed that shippers can recover treble-damages for filed tariffs that embody antitrust violations, but only *after* the ICC finds a tariff that was filed and became effective to be unlawful. *See* 104 S. Ct. at 2462 ("Where the Commission finds an effective tariff unlawful. injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow"); *see also id.* at 2466-67 (opinion of the Court), 2471 (O'Connor, J., dissenting). Thus, appellants read too much into the opinion in asserting that this result overrules *Keogh* with respect to tariffs that have been approved or have not been disapproved, although *ATA* does render *Keogh* inapplicable where the ICC has expressly found a filed tariff to be unlawful. This is of no aid to appellants, however, since the tariffs challenged here were not declared unlawful by the ICC.

Injunctive Relief and Damages from Anticompetitive Acts Other than Agreements to Fix Rates

Although appellees had moved for judgment on the pleadings only with respect to appellants' claims for

12 *Keogh* was cited in a footnote in the brief of a group of railroads as *amici curiae* as additional authority for the proposition that "[e]ven for an admitted violation of the Act's substantive provisions, a shipper is not entitled to a refund 'without proof of actual damages.'" Brief of Aberdeen & R. R.R., et al. at 12 n.20, *ATA*, *supra*. *Keogh* was also cited in the reply brief of the ICC in refutation of the argument that antitrust liability is an adequate deterrent; the ICC asserted: "But it is doubtful that many shippers can undertake an antitrust action given the costs and risks of such litigation. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922)." Reply Brief of Petitioners at 5, *ATA*, *supra*.

damages and not with respect to their claim for an injunction, a position well advised in light of *Georgia* v. *Pennsylvania R.R.*, *supra*, 324 U.S. at 454-55, Chief Judge Curtin dismissed the complaint in its entirety. He did not explain or even discuss why he dismissed *sua sponte* the claims for injunctive relief. The issue whether appellants could obtain an injunction had not been briefed. There is only a passing reference in a footnote in appellees' memorandum in support of the motion to dismiss to the effect that entry of the consent decree in the Government's action against NFTB would moot the injunction claims, and an equally brief response in a footnote in appellants' memorandum in opposition to this motion that the injunction claims "are not at issue" and thus "need not be dealt with." The injunction claims were neither raised nor discussed during the oral argument before the district court.

The district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard. *Lewis* v. *New York*, 547 F.2d 4, 5-6 & n.4 (2 Cir. 1976) ("Failure to afford an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal"); *Schlesinger Investment Partnership* v. *Fluor Corp.*, 671 F.2d 739, 742-43 (2 Cir. 1982); *see also Dodd* v. *Spokane County*, 393 F.2d 330, 334 (9 Cir. 1968); *Literature, Inc.* v. *Quinn*, 482 F.2d 372, 374 (1 Cir. 1973). Appellees urge that we nonetheless affirm the lower court's dismissal of the injunction claims because remand "would be a futile gesture in light of the injunction already obtained by the Government" in *United States* v. *Niagara Frontier Tariff Bureau*, *supra* note 1, 1984-2 Trade Cas. at ¶ 66,167. However, although the consent decree is far reaching, several of its provisions

are limited in duration and applicability. *See, e.g., id.* at parts VI. XIII. Moreover, as appellants have the right to seek relief beyond that obtained by the Government, *Madyun* v. *Thompson*, 657 F.2d 868, 871-72 (7 Cir. 1981), there may well remain additional matters as to which injunctive relief is appropriate. These issues cannot be determined on the sparse record before us. We must, therefore, remand to allow the plaintiffs an opportunity to show whether they are entitled to injunctive relief. To avoid waste of time and money, the district court may find it appropriate to address at the outset the issue of mootness raised by appellees on the basis of the Government consent decree.

In addition, appellants should be afforded an opportunity on remand to amend their complaint to state a claim for damages consistent with *Keogh*. That case applies only where the damages sought relate to filed tariffs, whether these result from a combination to file higher tariffs or from a combination to prevent others from taking independent action to file lower tariffs. *See* 260 U.S. at 161-63; *cf. City of Groton, supra*, 497 F. Supp. at 1049-52 (dividing claims into those relating to filed tariffs and those relating to anticompetitive behavior "beyond the mere promulgation of rates" and applying *Keogh* only to the former); *City of Groton, supra*, 662 F.2d at 928-34 (reversing the district court but adopting the same analytical framework). A shipper may recover damages if it can show that carriers caused injury to the shipper's business or property other than by higher tariffs, such as by impeding its ability to transport its goods to other markets and thus decreasing its sales.

Appellants alleged that appellees conspired together and that:

> [t]he aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise and maintain prices *and to inhibit or eliminate competition* for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement *and by otherwise engagiing in conduct that either was not or could not be approved by the ICC.*

Square D Complaint at ¶ 22 (emphasis added); Big D Complaint at ¶ 19. Appellants alleged further that appellees established a "Principals Committee" to further the conspiracy and that this committee "engaged in the joint setting of rates and related policies *and also agreed upon methods by which to inhibit competition for the transportation of freight. . . .*" Square D Complaint at ¶ 23(a) (emphasis added); Big D Complaint at ¶ 20 (a).[*] At oral argument on the motion to dismiss, appellants' counsel explained to the court that these allegations charged appellees with having done more than simply file excessively high traiffs. In addition, counsel explained, appellees agreed "not to solicit or to try to attract certain types of traffic," and engaged in boycotts and other acts which interfered with the ability of non-conspiring carriers to provide transportation services in order to discourage these carriers from taking independent action and to coerce them into accepting the conspirators' anticompetitive strategy.

Chief Judge Curtin held that "[w]hatever the beadth of plaintiffs' allegations, the complaint essentially focuses on what plaintiffs claim are unjust and excessive rates." To be sure, the portions of appellants' complaints that

state the nature of the injury suffered allege only injury caused from having to pay rates higher than those that would otherwise have prevailed. Square D Complaint at ¶ 26; Big D Complaint at ¶¶ 22, 23 However, the acts charged in the allegations quoted above could also support a claim that appellees injured appellants' business by impeding appellants' ability to market and sell their goods. As Professors Wright and Miller have indicated, "[a]mendment should be refused only if it appears to a certainty that plaintiff cannot state a claim." 5 Wright & Miller, *supra*, § 1357 at 612-13 (citing cases); *see also S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block*, 608 F.2d 28, 42 (2 Cir. 1979) (leave to amend should be granted if plaintiff "has at least colorable grounds for relief"). Thus, on remand, appellants should be afforded an opportunity, if they believe the facts justify it, to amend their complaint to state a proper claim for damages. Such a claim would, of course, be subject to any appropriate motions by appellees.

Insofar as the judgment dismissed appellants' claims for damages in respect of filed rates, it is affirmed. Insofar as it dismissed the claim for an injunction, it is reversed and the cause is remanded for further hearing. On remand, appellants shall be given an opportunity to amend their complaints, if so advised, to state claims for damages other than damages arising from the filed tariffs. No costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of April, one thousand nine hundred and eighty-five.

Present: HON. WILFRED FEINBERG, Chief Judge
HON. HENRY J. FRIENDLY
HON. IRVING R. KAUFMAN

CIRCUIT JUDGES,

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.

Plaintiff-Appellants,

AGAINST

84-7831

NIAGARA FRONTIER TARIFF BUREAU, INC., BONDY CARTAGE LIMITED; DOMINION-CONSOLIDATED TRUCK LINES, LIMITED; ICL INTERNATIONAL CARRIERS LIMITED; INTER-CITY TRUCK LINES (CANADA), INC.; TNT CANADA, INC.,

Defendant-Appellees.

UNITED STATES COURT OF APPEALS
FILED
APR 9 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

FILED
MAY 6 8:32 AM '85
U.S. DISTRICT COURT
W.D. OF N.Y.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part, reversed in part and remanded without costs to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk

by _____
Edward J. Guardaro, Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH, CLERK

By _____
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Plaintiff(s)

v. **CIV-84-158C**

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Defendant(s)

SIR/MADAM: Take notice of an ORDER and a JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 25th day of September, 1984 and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 25th day of September, 1984.

Dated: Buffalo, New York
September 25, 1984

JOHN K. ADAMS, Clerk
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Douglas V. Rigler, Esq.
Donald L. Flexner, Esq.
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Arnold Levin, Esq., Howard Sedran, Esq.
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Peter D. Standish, Esq.
J. Edmund deCastro, Jr., Esq.
Robert B. Conklin, Esq.
James M. Kieffer, Esq., Brian P. Fitzgerald, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Plaintiffs,

-VS-

CIV-84-158C

NIAGARA FRONTIER TARIFF BUREAU INC.; BONDY CARTAGE LIMITED; DOMINION-CONSOLIDATED TRUCK LINES LIMITED; ICL INTERNATIONAL CARRIERS LIMITED; INTER-CITY TRUCK LINES (CANADA) INC.; TNT CANADA INC.,
Defendants.

APPEARANCES: FOLEY & LARDNER (DOUGLAS V. RIGLER, ESQ., of Counsel), Washington, D.C., for Plaintiffs.

WILLIAM, RANDOLPH, SMITH, CROWELL & MORING (DONALD L. FLEXNER, ESQ., of Counsel), Washington, D.C., for Defendants.

The court has deferred ruling on various pending discovery motions and a motion for class certification. Before the court is defendants' motion to dismiss. Fed.R.Civ.P. 12(c) and 12(h)(2).

The allegations in the complaint may be summarized as follows. The Niagara Frontier Tariff Bureau, Inc. [NFTB] is a motor carrier rate bureau with headquarters in Buffalo, New York. It is organized and operates under an agreement which has been filed with and approved by the Interstate Commerce Commission [ICC]. The NFTB is a defendant, along with various named common carrier defendants that are defendants that are members of NFTB. These carrier defendants move goods between the United States and Canada.

Plaintiffs now allege that beginning in 1966 and continuing until about 1981, the defendants and their coconspirators entered into a conspiracy to fix prices and to eliminate or restrict competition for the transportation of goods between the United States and the Province of Ontario.

Specifically, the plaintiffs allege that the defendants and their coconspirators "[p]articipated in a Principals Committee which was comprised of the senior management officials of NFTB carriers" but which "was not authorized or approved by the ICC to engage in rate-making conduct. [Complaint, ¶ 23(a).] Plaintiffs allege that this Committee was used to set rates and inhibit competition. This, the plaintiffs allege, was done by way of threats, coercion, and retaliatory rate reductions. Plaintiffs allege that all of this was accomplished in secret; none of these activities was disclosed to the ICC.

As a result, the plaintiffs claim violations of section 1 of the Sherman Act [15 U.S.C. § 1] and sections 4 and 16 of the Clayton Act [15 U.S.C. §§ 15, 26] and seek treble damages for the loss of benefit of legitimately competitive rates.

Although two separate actions were filed by Square D Company and Big D Building Supply Corp., this court's order of June 27, 1984, directed that these two actions proceed as a consolidated suit. A third and similar action filed by the United States against NFTB has been discontinued by consent of the parties and by order of this court, *United States v. NFTB*, No.

83-1313 (W.D.N.Y. June 26, 1984). All that remains is this consolidated civil antitrust suit.

I.

The defendants now move to dismiss, arguing failure to state a claim, and seek judgment on the pleadings. Defendants insist that *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and its progeny completely bar plaintiffs' antitrust damage claims.

Keogh, like the plaintiffs in this case, was a shipper. The defendant railroads in the *Keogh* case formed an association and agreed to certain interstate freight rates which the ICC determined were reasonable and not discriminatory. Failing to convince the ICC that the defendants' rates were unlawful, Keogh filed a suit in federal court challenging the rates under the Sherman Act. The Court held that Keogh could not obtain antitrust damage against the defendant carriers based upon a carrier conspiracy to fix tariff rates which were filed with the ICC and subject to that agency's regulatory control.

The reasoning of *Keogh* was followed in *Georgia v. Pennsylvania Railway Co.*, 324 U.S. 439 (1945). *Georgia* sought money damages as well as injunctive relief. The Supreme Court held that in light of *Keogh*, there was no basis for the recovery of money damages, even if the conspiracy alleged were shown to exist. The complaint in *Georgia* also alleged coercion and discrimination, but the Court held that this did not create a basis for shipper antitrust damage claim against carriers. An injunctive action, and even a criminal prosecution, may go forward, but a claim for treble damages under the antitrust statute may not.

To avoid the directives of the Supreme Court, plaintiffs now argue that *Keogh* does not apply because 1) subsequent legislation has diffused the authority of *Keogh*, and 2) the facts of the instant case amount to a "broader conspiracy" that does not fall within the purview of *Keogh*.

II.

First, the legislative activity since *Keogh* has defined and preserved antitrust immunity where a rate agreement was implemented "in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission." Reed-Bulwinkle Act, 62 Stat. 472 (1948). The House Report supporting this legislation states that:

> [t]he bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to joint agreements or arrangements between them as may have been submitted to the [ICC] and approved by that body."

H.R. Rep. No. 1100, 80th Cong., 1st Sess., at 5 (1947).

The Reed-Bulwinkle Act was intended "to dispel the uncertainty" about the rate bureaus' powers, for there was at that time a growing concern about the potential abuse of those powers. 94 Cong. Rec. A3888 (June 14, 1948) (remarks of Cong. Loa). It was not intended to *expand* antitrust liability. Certainly, this court may not infer that Congress had intended to alter the significance of the *Keogh* and *Georgia* rulings when the legislative history specifically states that the relationship with antitrust laws shall not be altered. *See* H.R. Report, *supra*.

Moreover, it is clear that courts since Reed-Bulwinkle have consistently applied *Keogh* without recognition of any legislative alteration of the dictates of the Supreme Court. *See, e.g., McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980); *Litton Systems, Inc. v. Amer. Tel. & Tel. Co.*, 700 F.2d 785, 820-21 (2d Cir. 1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *In re Wheat Rail Freight Rate Antitrust Litigation*, 1984-1 Trade Cas. (CCH) ¶ 65,861 (N.D. Ill. 1984); *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trad Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974).

Plaintiffs argue that two cases illustrate a post-Reed-Bulwinkle departure from *Keogh*. The earlier, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), concerns shipping, *not* motor carriers, and never mentions *Keogh*. The more recent, *Interstate Commerce Commission v. American Trucking Association, Inc.*, ____ U.S. ____, 104 S.Ct. 2458 (1984), specifically recognizes that antitrust immunity has limits. Under Reed-Bulwinkle and the more recent Motor Carrier Act, Pub..L. 96-296, 94 Stat. 793, rate bureaus must conform to specific guidelines in order to retain antitrust immunity. 49 U.S.C. § 10706(b)(3)(A), (B); *Interstate Commerce, supra* at 2461 n.1. In short, neither case supports a view that Congress has in any way detracted from the Supreme Court's instruction in *Keogh*.

III.

Plaintiffs' second position deserves careful address. The complaint specifically alleges that the defendants acted outside the scope of the NFTB agreement by "engaging in conduct that either was not or could not be approved by the ICC." [Complaint, ¶ 22.] The plaintiffs argue that this "broader conspiracy" places the defendants outside recognized antitrust immunity.

Justice Brandeis, writing for the court in *Keogh*, stated:

> [U]nder the Anti-Trust Act, a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. . . . It does not, however, follow the Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. . . .
>
> A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. . . . If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. . . .
>
> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

260 U.S. at 161-63. The Court further explained:

> This stringent rule prevails because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.

Whatever the breadth of plaintiffs' allegations, the complaint essentially focuses on what plaintiffs claim are unjust and excessive rates. As the court in *Pinney Dock & Transport Co. v. Penn Central Corp.*, ____ F. Supp. ____, ____ (N.D. Ohio 1983) ("Pinney II"—on reconsideration), recognized, there are attendant complications with respect to a damage calculation which depends upon a hypothetical rate, since rate determinations are a matter for the ICC and not for the court. Although the plantiffs rely on *Pinney Dock* for the proposition that a "broader conspiracy" avoids *Keogh*, they cite the original opinion on motion to dismiss—not the later reconsideration motion. *Pinney Dock* 1983-2 Trade Cas. (CCH) ¶ 65,607 (N.D. Ohio 1983) ("Pinney I"). The later opinion of Judge Thomas clarifies two important points: 1) Pinney was claiming antitrust damage as a *competitor*—not a customer; and 2) "dismissal of the

plaintiffs claim [when a *customer*] would appear then to be the only alternative." *Pinney II*. *See Monticello Heights*, *supra* (dismissal of shipper complaint despite allegations not only of price-fixing, but also of monopolization through coercive and exclusionary conduct).

Finally, "prior ICC approval of a rate does not influence the *Keogh* rule." *See Monticello*, *supra*, and *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Gas. (CCH) § 63,980 (N.D. Cal. 1980) (shipper antitrust actions dismissed without regard to whether or not the ICC had approved the rates).

Although palintiffs claim that some "larger conspiracy" like that recongized in *United States v. Bessemer and Lake Erie R.R. Co.*, 717 F.2d 593, 600 (D.C.D.C. 1983), would evade *Keogh*, *Bessemer* involved a criminal proceeding—precisely the kind already instituted and dropped without indictment and upon consent of the parties in the instant civil action.

IV.

In sum, this court is unpersuaded that plaintiffs have a right to maintain this suit. For these reasons, defendants' motion to dismiss is granted. Consequently, the remaining motions need not be addressed. The Clerk is directed to enter judgment dismissing the complaint.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: September 25, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Plaintiff(s)

v. **CIV-84-158C**

NIAGARA FRONTIER TARIFF
BUREAU, INC., *et al.*,
Defendant(s)

SIR/MADAM: Take notice of an ORDER and a JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 25th day of September, 1984 and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 25th day of September, 1984.

Dated: Buffalo, New York
September 25, 1984

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JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.

V. **Civ-84-158C**

NIAGARA FRONTIER TARIFF
BUREAU, INC., *et al.*

HONORABLE JUDGE T. CURTIN

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

It Is Ordered and Adjudged: That pursuant to a Decision & Order entered September 25, 1984, the complaint is dismissed.

John K. Adams, Clerk
Buffalo, New York
Sept. 25, 1984

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D CO.

Plaintiff,

-AGAINST- **CIV 84-158**

NIAGARA FRONTIER TARIFF BUREAU, *et al.*,

Defendants.

Proceedings:
Oral argument.

Before:
HON JOHN T. CURTIN, USDJ.

Location:
U.S. DISTRICT COURT
Buffalo, New York

Date:
June 19, 1984.

Reporter:
EUGENE R. BECKSTEIN

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United States Attorney,
By: SONIA C. JAIPAUL, ESQ.
Assistant United States Attorney,
Appearing for the Government.

The Court:
Well, why don't I see what Mr. Flexner has to say about this, and then we'll have you back Mr. Rigler. Keep this in focus. Mr. Flexner, what do you say about what Mr. Rigler just pointed out to us?

Mr. Flexner:

Your Honor, let me start with the conduct issue. Mr. Rigler comes before the Court and says, your Honor, this is a serious case because the conduct at issue is outside the scope of the statutory immunity, and that is what the complaint says and that is what we concede for purposes of this motion. We concede that. It is irrelevant, your Honor. What is relevant in the two complaints that are before the Court are the damage and injury sections. If you look at paragraph 22, in the Big D Supply Corporation complaint, what you see is the following allegations. By reason of the defendants and their co-conspirators illegal conduct, plaintiff and the members of the class it represents were compelled to pay and have paid substantially higher prices for the carriage of cargo than they would have paid absent defendants' combination and conspiracy. That is what Keohoe is all about. That is an attack on the rates that were charged by the defendants. The damages sought are the differences between the filed and published rates, and some hypothetical rate that the plaintiffs claim would have existed if there were not an interference with the right of independent action, which the plaintiff says was so serious as to deprive these defendants of their antitrust immunity.

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Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SQUARE D COMPANY AND
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

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QUESTION PRESENTED

Should this Court overrule its decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), which was reaffirmed in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), was preserved by Congress, and has been cited with approval by this Court and applied consistently by the lower courts for more than sixty years?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
1. The *Keogh* doctrine has been uniformly and properly applied by the courts	6
2. Congress has preserved the *Keogh* doctrine	9
3. Departure from the principle of *stare decisis* on this question of statutory interpretation is unwarranted	12
CONCLUSION	16
APPENDIX A—Rule 28.1 Information	1a
APPENDIX B—*In Re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587, slip op. (E.D. Pa. June 5, 1985)	2a

TABLE OF AUTHORITIES

CASES	Page
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	7, 13
Asbury Graphite, Inc. v. Dehyco Co., 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980)	8
Board of Trade v. ICC, 646 F.2d 1187 (7th Cir. 1981)	8
Burlington Northern Inc. v. United States, 459 U.S. 131 (1982)	13
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	4
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	11
Flood v. Kuhn, 407 U.S. 258 (1972)	11
Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945)	*passim*
Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)	9
ICC v. American Trucking Associations, Inc., 104 S.Ct. 2458 (1984)	*passim*
In Re Lower Lake Erie Iron Ore Antitrust Litigation, MDL 587, slip op. (E.D. Pa. June 5, 1985)	8, 14
In Re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112	7, 8, 14
Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922)	*passim*
McLain v. Real Estate Board, 444 U.S. 232 (1980)	5, 9
Minsky v. Auto Driveaway, 757 F.2d 718, *cert. denied*, 105 S.Ct. 435 (1984)	6, 8, 9, 14
Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct. 1464 (1984)	11
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)	13
Monticello Heights, Inc. v. Morgan Drive Away, Inc., 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D. N.Y. 1974)	8, 14
Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)	9
Pfizer Inc. v. Government of India, 434 U.S. 308 (1978)	11

TABLE OF AUTHORITIES—Continued

	Page
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	9
Southern Motor Carriers Rate Conference v. United States, 105 S.Ct. 1721 (1985)	11
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 596 F. Supp. 153 (W.D.N.Y. 1984), *issue aff'd on appeal*, 760 F.2d 1347 (2d Cir. 1985)	*passim*
Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	13
United States v. Braverman, 373 U.S. 405 (1963)	2
United States v. Niagara Frontier Tariff Bureau, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D. N.Y. 1984)	2
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	6, 7, 9, 12
United States v. RCA, 358 U.S. 334 (1959)	9
United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932)	9
STATUTES	
Antitrust Reciprocity Act, Pub. L. No. 97-393, 96 Stat. 1964 (1982)	11
Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982)	11
Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (1980)	11
Interstate Commerce Act	
49 U.S.C. § 10701 (1982)	2, 16
49 U.S.C. § 10704 (1982)	2, 14, 16
49 U.S.C. § 10708 (1982)	2, 16
49 U.S.C. § 10741 (1982)	2, 16
49 U.S.C. §§ 10761-10762 (1982)	1, 16
49 U.S.C. § 11701 (1982)	14
49 U.S.C. § 11705(b), (c) (1982)	2, 14
49 U.S.C. § 11903(a) (1982)	2
Local Government Antitrust Act, Pub. L. No. 98-544, 98 Stat. 2750 (1984)	11
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	11, 16

TABLE OF AUTHORITIES—Continued

Page

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) 10
Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) 2, 9, 10
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) 11

LEGISLATIVE MATERIALS

H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844 10
S. Rep. No. 44, 80th Cong., 1st Sess. (1947) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY AND
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Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' JOINT BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This antitrust damage action is based upon common carrier rates regulated pursuant to the Interstate Commerce Act ("ICA"). Under that Act, freight rates charged by motor common carriers must first be filed with the Interstate Commerce Commission ("ICC") in published tariffs, and it is a criminal violation for a carrier to charge anything but the filed rate. 49 U.S.C. §§ 10761-

10762, 11903(a) (1982).[1] Further, Congress granted the ICC plenary power over motor carrier rates, including the authority to determine whether such rates are unreasonably high or unjustly discriminatory. *Id.* at §§ 10701, 10741. The Commission is authorized, either on its own motion or on shipper complaint, (1) to suspend proposed rates, (2) to investigate rates and (3) to invalidate rates that do not comply with Congressional policy. *Id.* at §§ 10704, 10708. Shippers may also seek reparations for excessive rates. *Id.* at § 11705(b)(3). In addition, as this Court held last term in *ICC v. American Trucking Associations, Inc.*, 104 S.Ct. 2458, 2466 (1984) (*"ATA"*), the ICC has statutory authority to nullify tariffs retroactively and thereby to require carriers to "disgorge" rate increases found by the Commission to be the product of substantial violations of approved rate bureau procedures.

Petitioners are shippers of goods by truck who brought suit under the federal antitrust laws seeking treble damages from, and injunctive relief against, five Canadian motor carriers and their rate bureau.[2] The complaints charge that the Respondents' collective ratemaking between 1966 and 1981 exceeded the statutory immunity embodied in the Reed-Bulwinkle Act, 62 Stat. 472 (1948), because of a failure to follow rate bureau procedures and efforts to forestall independent rate action.[3] Petitioners claim not that they were charged other than the filed rates, but that they were damaged because those rates were excessive.

---

[1] As this Court has recognized, Congress intended "to prevent any kind of departure from the published rates." *United States v. Braverman*, 373 U.S. 405, 406 (1963).

[2] The identity of the Respondents and other information required by Rule 28.1 is set forth in Appendix A.

[3] These cases followed a Department of Justice civil injunction action, which was ultimately terminated by entry of a consent decree that governs the manner in which Respondents can set rates collectively. *United States v. Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984).

It is undisputed that the rates in issue here were at all times duly filed with the ICC, and never set aside, disapproved or nullified by the Commission.[4] Nor have Petitioners ever challenged Respondents' rates or ratemaking conduct before the ICC, or otherwise sought damages or other relief under the Interstate Commerce Act. Instead, they brought these federal court antitrust actions, which seek treble damages measured by the difference between the rates that the Respondents periodically filed with the ICC and hypothetical lower rates that Petitioners contend would have been filed with the Commission, and would have been lawful under ICA standards, absent the claimed illegality.

The district court granted Respondents' motion for judgment on the pleadings based upon this Court's decisions in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). The court held that, under *Keogh* and *Georgia*, shippers have no damage claim under the antitrust laws based on "tariff rates which were filed with the ICC and subject to that agency's regulatory control." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153, 154 (W.D.N.Y. 1984). The district court also noted that the *Keogh* decision rejecting this damage theory had been "consistently applied" by the courts. *Id.* at 154-55.

A unanimous panel of the Second Circuit, composed of Chief Judge Feinberg and Judges Kaufman and Friendly, affirmed dismissal of the damage claim. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985). The opinion written by Judge Friendly canvassed both the history of the *Keogh* doctrine and subsequent legislative and judicial developments. The court, while questioning the currency of *Keogh*'s reasoning, concluded that *Keogh* had been reaffirmed by this

---

[4] *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1364 (2d Cir. 1985).

Court, had been preserved by Congress, had been consistently applied by the lower courts, and therefore remained good law.

In particular, the court of appeals examined the legislative history of the Reed-Bulwinkle Act, and rejected Petitioners' assertion that the Act had overruled *Keogh*. The court determined that, in passing Reed-Bulwinkle, Congress was well aware of the existence of the *Keogh* and *Georgia* decisions and did not intend, by immunizing certain ratemaking conduct, to upset settled law limiting the scope of antitrust damages. On the contrary, Congress affirmatively expressed an intent to preserve *Keogh* by stating that the antitrust laws should continue to operate only "so far as they are now applicable." *Id.* at 1359.

The appellate court also rejected Petitioners' argument that this Court's decision in *ATA* had somehow overruled *Keogh* and *Georgia*. Judge Friendly noted that *ATA*'s holding dealt only with remedies under the Interstate Commerce Act, and that the opinion did not even mention *Keogh*. *Id.* at 1364 & n.12.[5] The *ATA* Court had indicated in dictum the possibility of antitrust damage recoveries for unlawful rates, but only *after* those rates had been disapproved by the ICC. 104 S.Ct. at 2462. The Second Circuit held that this proposition is irrelevant here because the rates challenged by Petitioners have never been disapproved, set aside or held unlawful by the ICC. 760 F.2d at 1364.[6]

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[5] The Second Circuit rejected on the same grounds Petitioners' suggestion that *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), is inconsistent with *Keogh*, holding that "if the Court intended to overrule *Keogh* or even seriously to question that decision, it would have discussed or at least mentioned the fact," which it did not. 760 F.2d at 1362. The court below also noted that *Carnation* arose under the Shipping Act, an entirely different regulatory scheme. *Id.* at 1362.

[6] Petitioners do not contend that *ATA* can be read any more broadly than the Second Circuit did, Petition at 17, nor do they dispute the holding of the court below that even this reading of *ATA* has no applicability to the present case because the rates in question were never disapproved by the ICC. Further, having read *ATA* as referring to "disapproved" rates, Petitioners do not explain why they claim that *ATA* is "incompatible" with *Keogh*, which says that the filed rate is the only lawful rate "unless and until suspended or set aside" by the ICC. 260 U.S. at 163.

Consequently, the Second Circuit affirmed the decision of the district court to the extent that it barred Petitioners' damage claims premised on the difference between the lawful rate, as actually filed with the ICC in published tariffs, and some hypothetical rate. The court remanded the matter, however, to allow Petitioners an opportunity to pursue alternative damage claims, as well as their claims for injunctive relief. This petition followed.

REASONS FOR DENYING THE WRIT

This Petition raises no novel or important question of law. The issue of statutory interpretation presented here was decided by this Court in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). Twenty-three years later, in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), this Court reaffirmed and clarified *Keogh* in a manner that leaves no doubt that it is directly controlling on the facts of this case. The clear holding of both cases is that, while anticompetitive conduct by common carriers remains subject to criminal prosecution and equitable remedies, Congress intended that shippers pursue damage claims based on filed rates before the ICC, not in the antitrust courts.

Keogh and *Georgia* have been consistently applied by every court that has had any occasion to consider cases such as this one during the past sixty years, including the Court of Appeals for the Second Circuit below. There is no split in the circuits, this Court has consistently cited *Keogh* and *Georgia* with approval, *see, e.g., McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) and

United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 & nn.28, 29 (1963), and as recently as last term this Court rejected the opportunity to overrule *Keogh* by denying a petition for *certiorari* that is indistinguishable from this one for any relevant purpose. *Minsky v. Auto Driveaway*, 105 S.Ct. 435 (1984). Moreover, the limitation on treble damages prescribed by *Keogh* and *Georgia* has been preserved by Congress in the course of re-examining the relationship between the Interstate Commerce Act and the antitrust laws. There is therefore no reason for this Court to reconsider *Keogh* at this late date.

1. The *Keogh* doctrine has been uniformly and properly applied by the courts.

In the six decades since *Keogh*, no court has ever allowed a shipper to maintain an antitrust damage action based on rates embodied in tariffs filed with the ICC. The holding in *Keogh* has been followed by every court presented with the issue in shipper cases, and applied with a consistency rare in the field of antitrust jurisprudence.

In *Keogh*, a shipper sued eight railroads for price-fixing, claiming damages based on the difference between the filed rate and some hypothetical rate that would have existed absent the alleged conspiracy. A unanimous Court, per Justice Brandeis, rejected this damage theory. After first recognizing that the underlying conduct remained subject to government prosecution, this Court held that Congress, having enacted in the Interstate Commerce Act a comprehensive scheme of shipper rights and remedies for excessive or discriminatory rates, did not intend to grant an additional damage remedy in the antitrust courts that could frustrate the ICC's administration of the regulatory statute. 260 U.S. at 161-62. Under the Interstate Commerce Act, the lawfulness of a filed rate is for the ICC to determine:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside [by the ICC], this [filed] rate is made for *all purposes* the legal rate as between shipper and carrier. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163 (emphasis added). Thus, as to damage theories that implicate filed rates, the Court held that the ICC remedy was exclusive, a ruling based on the "plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 & n.29 (1963).[7]

In *Georgia*, the state, suing in part as a shipper, charged the defendants with an illegal conspiracy to impose excessive and discriminatory transportation rates by coercing rate bureau members. 324 U.S. at 444-45. The complaint sought damages based on filed rates, as well as injunctive relief, and this Court held that the damage claims were barred:

> We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist.

Id. at 453. But the Court sustained the injunction claims because the underlying conduct, as opposed to the filed rates, was outside the ICC's jurisdiction. *Id.* at 458.

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[7] In this connection, the *Keogh* Court was also concerned with allowing an antitrust jury to speculate, and substitute its judgment for that of the expert agency, as to the lawfulness of a hypothetical rate under the ICA. 260 U.S. at 164-65. Judicial "speculation about what [a regulatory] Commission might have done" under hypothetical circumstances is still disfavored, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79, 581 n.11 (1981), and is a qualitatively different matter than determining the "competitive" rate in an unregulated market. *See also, In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1313 (7th Cir. 1985), *petition for cert. filed*, No. 85-112 (holding that determination of hypothetical rate lawfulness under the ICA would be an "impossibly speculative task").

Petitioners' attempt to distinguish *Keogh* from this case on the facts is not only an issue unworthy of this Court's attention, but is unavailing. Petition at 7-8. Indeed, the *Georgia* case—which Petitioners fail to cite even once—is flatly inconsistent with the assertion that *Keogh* does not apply where (1) the ICC has not approved the rate or (2) there are allegations of coercion. First, as the Second Circuit noted, *Georgia* applied *Keogh* even though the rates at issue had been filed with, but never approved or disapproved by, the ICC. 760 F.2d at 1356.[8] Second, the *Georgia* Court upheld *Keogh* as a bar to treble damage recovery notwithstanding that the alleged conspiracy extended beyond mere collective ratemaking to efforts to coerce other carriers wishing to file independent rates. 324 U.S. at 444, 457-59.[9]

As to shipper antitrust damage claims, *Keogh* and *Georgia* have been consistently and properly applied by the lower courts in the intervening years. The unbroken line includes the Second Circuit's opinion below and three recent decisions by the Seventh Circuit. *In Re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112; *Minsky v. Auto Driveaway*, 757 F.2d 718, *cert. denied*, 105 S.Ct. 435 (1984); and *Board of Trade v. ICC*, 646 F.2d 1187 (7th Cir. 1981). In addition, three district courts—from the Third, Ninth and Second Circuits—have applied the doctrine, most recently in *In Re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587, slip op. (E.D. Pa. June 5, 1985) (Appendix B). *See also, Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); and *Monticello Heights, Inc.*

[8] Petitioners' distinction is also inconsistent with the language in *Keogh* that "[u]nless and until suspended or set aside," the filed rate is the only lawful rate. 260 U.S. at 163.

[9] Thus, Petitioners are entirely disingenuous in asserting that the "*Keogh* holding has not been reviewed by this Court since 1922." Petition at 6.

v. Morgan Drive Away, Inc., 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974). *Keogh* has frequently been cited with approval by this Court,[10] and just last term this Court declined the opportunity to overrule it by denying a *certiorari* petition identical to this one in all relevant respects. *Minsky v. Auto Driveaway Co.*, 105 S.Ct. 435 (1984).[11]

In short, there is no inconsistency in the law, and Petitioners do not contend otherwise.

2. Congress has preserved the *Keogh* doctrine.

By creating express statutory immunity for certain common carrier collective ratemaking activity in the Reed-Bulwinkle Act of 1948, Congress did not intend, as Petitioners would have it, to supplant existing law on the scope of the antitrust damage remedy. To the contrary, the legislative history of that provision demonstrates that Congress was well aware of the *Keogh* doctrine and deliberately chose to preserve it.

As the Second Circuit opinion explained, the impetus for the Reed-Bulwinkle Act was provided by the antitrust enforcement actions *Keogh* had left open—criminal prosecutions and civil injunction actions directed against the collective ratemaking activities of ICC-regulated car-

[10] *See McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 & n.12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972); *United States v. Philadelphia National Bank*, 374 U.S. 321, 351 n.29 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); *United States v. RCA*, 358 U.S. 334, 347-48 (1959); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 485 (1932).

[11] It bears mention that the petition in *Minsky* was denied five months after this Court issued its decision in *ATA*. *See* Petition at 16-17.

riers. 760 F.2d at 1359-60.[12] Thus, it was antitrust sanctions other than shipper treble damage actions with which Congress was concerned, and the purpose of Reed-Bulwinkle was to relieve common carriers from such sanctions. The Second Circuit found no suggestion in the legislative history of any intent to overrule *Keogh*, nor any conflict between the *Keogh* doctrine and the Reed-Bulwinkle Act. *Id.* at 1360.

This conclusion flows from the documentation of numerous references to *Keogh* and *Georgia* in the Reed-Bulwinkle legislative history. *See id.* at 1359-60. Not only was Congress well aware of those cases, but, in granting immunity for certain ratemaking conduct, was "at pains to insert [a] qualifying phrase," *id.* at 1359, in the legislative history showing that it did not intend to override existing limitations on the scope of antitrust remedies:

> [t]he bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable* . . . .[13]

The Reed-Bulwinkle history therefore supports the conclusion that Congress in 1948, far from intending to undermine *Keogh*, understood and approved of that decision.

In more recent times, Congress has enacted five statutes to amend regulation of common carriers by land,[14]

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[12] *See* S. Rep. No. 44, 80th Cong., 1st Sess. 5-6 (1947) *and* H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1846-47. One of these instances was the *Georgia* case, because, as noted above, after dismissing the damage claims under *Keogh*, the Court went on to hold that an injunction action could be maintained. 324 U.S. at 455.

[13] S. Rep. No. 44, *supra*, at 7; H.R. Rep. No. 1100, *supra*, at 5, *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1848 (emphasis added).

[14] *See* 760 F.2d at 1355. The acts are the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (1980); the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982).

yet it has never uttered a word in disapproval of the *Keogh* decision or otherwise acted to vitiate its regulatory underpinnings.[15] Indeed, contrary to Petitioners' statement (Petition at 15), the Second Circuit held that the Motor Carrier Act of 1980 "does not overrule *Keogh*." 760 F.2d at 1360 n.7. This record of continual legislative acquiescence in established Supreme Court precedent in the transportation field is to be contrasted with two contemporaneously-enacted antitrust remedy statutes, each of which specifically addresses a Supreme Court ruling of concern to Congress.[16] Where, as here, Congress has taken an active role in the field, and has affirmatively indicated an intent to preserve a ruling of this Court, there is no warrant for this Court to overturn its long-standing precedent.[17]

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[15] For an explanation of why recent legislation bearing on motor carriers neither specifically affects this case nor generally affects the ICC's rate regulation powers that underpin the *Keogh* decision, *see infra* at pp. 15-16.

[16] The Antitrust Reciprocity Act, Pub. L. No. 97-393, 96 Stat. 1964 (1982), responded to *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978), regarding the antitrust remedies of foreign governments; and the Local Government Antitrust Act, Pub. L. No. 98-544, 98 Stat. 2750 (1984), resolved the issue left open in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) whether local governments may be subject to antitrust damages.

[17] *See Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721, 1726 n.18 (1985) (declining to abandon the implied antitrust immunity for state action "after over 40 years of Congressional acquiescence") *and Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1473 (1984) (Brennan, J., concurring) (noting that the Court had declined the Solicitor General's invitation to reverse a 73-year-old statutory interpretation of the Court that Congress was aware of but had not overruled). *Cf. Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

3. Departure from the principle of *stare decisis* on this question of statutory interpretation is unwarranted.

It is not this Court's practice to disregard basic principles of *stare decisis* and overrule its past decisions. This case does not present the occasion to depart from that settled principle.

First, as noted above, nothing in the manner in which *Keogh* and *Georgia* have been applied by the lower courts indicates that the doctrine has been a source of confusion or inconsistency; indeed the cases demonstrate the contrary.

Second, as also pointed out above, the *Keogh/Georgia* doctrine exists in an area in which Congress has been extraordinarily active—defining antitrust immunity in the transportation field and the scope of antitrust treble-damage remedies. Where Congress has been content with this Court's interpretation of its statutes, has taken affirmative steps to preserve such interpretation in legislative history, and where such an interpretation can be easily overturned by a simply-defined statutory amendment, adherence to the principles of *stare decisis* is particularly appropriate.

Third, Petitioners' arguments for overturning *Keogh* cannot be reconciled with prior decisions of this Court and Congressional action.

a. Petitioners argue that *Keogh* and *Georgia* have been overtaken by the judicial maxim that antitrust immunities are disfavored. Petition at 11. Their position collides with this Court's own explicit recognition in 1963 that both *Keogh* and *Georgia* were among the cases applying this maxim, and that *Keogh* itself was then one of only two cases in which "plain repugnancy between the antitrust and regulatory provisions" had been found. *United States v. Philadelphia National Bank*, 374 U.S. at 350-51 & nn.28 & 29. *See also Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 456-57 (recognizing that "repeals by implication are not favored" and may be found only where there is a "clear repugnancy").[18]

Moreover, as both *Keogh* and *Georgia* make plain, vindication of the ICC's jurisdiction over common carrier rates requires only a narrow limitation on antitrust damage remedies, not a blanket immunity for all violations.[19] Thus, conduct such as that alleged here—unauthorized and coercive price-fixing—remains subject to a wide range of antitrust remedies, including civil injunctions, criminal penalties and damage theories not based on filed rates. In addition, substantial violations of rate bureau procedures, as alleged by Petitioners, are subject to the ICC's authority to nullify rates retroactively, which this Court acknowledged in *ATA* would make the ICC, not the threat of antitrust liability, the "primary enforcer" of compliance with such procedures. 104 S.Ct. at 2467.[20]

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[18] A court may not, through the use of its equitable powers or through the award of damages, establish a rate or speculate as to what rate a regulatory agency would have established or approved. *Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982) (federal court may not enter an injunctive order "that operates to fix [ICC-regulated] rates"); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (state court may not enter damage award that "amounts to a retroactive right to collect a rate in excess of the filed rate"); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (reasonable rate cannot be litigated in a judicial forum because there is no legal rate "other than the filed rate, whether fixed or merely accepted by the Commission"); *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907) (recognition of a common law right to damages for rates charged by a common carrier is "wholly inconsistent with the administrative power" conferred on the ICC to regulate such rates).

[19] This Court expressly recognized in *Georgia*, while reaffirming *Keogh*, that carriers "have no immunity from the antitrust laws." 324 U.S. at 457.

[20] The Court in *ATA* was comforted because such a harsh remedy would be administered with discretion by the expert agency. 104 S.Ct. at 2466-67.

Through these enforcement mechanisms, compliance with antitrust and regulatory laws may be promoted, while the ICC's exclusive jurisdiction over rates is protected.[21]

b. Petitioners' added plaint that the application of *Keogh* leaves shippers without a remedy rings particularly hollow. First, as the Second Circuit held, shippers may assert any antitrust damage claims that do not implicate filed rates.[22] Furthermore, as this Court recognized in *ATA*, 104 S.Ct. at 2462-63, shippers have an entire panoply of remedies available to them under the Interstate Commerce Act, including the right to seek to have rates set aside by the ICC and the right to sue for reparations. 49 U.S.C. § 11705(b), (c) (1982).[23]

In addition, and of particular significance, this Court just last term in *ATA* approved an additional shipper remedy for rate bureau violations: *retroactive* nullification of the tariff. In so doing, the Court recognized that overcharge awards to shippers based on the difference between the nullified rate and the pre-existing rate "can easily surpass the damages for which carriers have historically been liable under § 11705(b)(3)," and may even

[21] In the shipper cases to which *Keogh* has been applied, these enforcement mechanisms have been freely employed. The *Iron Ore*, *Minsky* and *Morgan Drive Away* cases were all preceded by criminal prosecutions for rate bureau violations. This case, as noted, followed a civil injunction action by the government, and the defendants in *Georgia* also faced an injunction action. Finally, in *Wheat Rail*, the ICC thoroughly reviewed the challenged rates and specifically refused to nullify them, an exercise of discretion noted with approval by this Court in *ATA*. 104 S.Ct. at 2468 n.13.

[22] The district court has afforded Petitioners an opportunity to amend their complaints, and Petitioners have stated that they intend to do so.

[23] Petitioners cite *ATA* for the proposition that the ICC is unable to review on its own motion the hundreds of tariffs filed each year, omitting reference to the fact that the statute expressly lodges with shippers the right to initiate an ICC investigation through a complaint. 49 U.S.C. §§ 10704(f), 11701 (1982).

exceed treble damages under the antitrust laws. 104 S.Ct. at 2467. As the Court said:

> In effect, the Commission has informed all motor carriers submitting proposed tariff increases that the Commission will approve those increases subject to the condition that the carriers may be called upon to *disgorge* the increases if the Commission later discovers that the tariffs were submitted in substantial violation of a rate-bureau agreement.

Id. at 2466 (emphasis added). Noting that "[f]or a motor carrier, overcharge liability may be ruinous," the Court pointed out that the "effect of the . . . new remedy is to convert the ICC into the federal government's most potent enforcer of the antitrust laws for the purpose of insuring compliance with [rate bureau procedures]." *Id.* at 2467. The addition of the ICC's retroactive nullification authority to traditional ICA powers makes it clear that the remedies available to shippers today are greater than those at the time *Keogh* was decided.

c. Similarly, Petitioners assert that the *Keogh* rationale is outdated because the ICC now recognizes "a zone of reasonableness." Petition at 10-11. In fact, this concept is long-established, and was expressly acknowledged in *Keogh* and *Georgia*.[24] Nonetheless, this Court held that Congress had intended the validity of a filed rate to hinge solely on whether it was reasonable and nondiscriminatory, as determined by the ICC.

d. Finally, contrary to Petitioners' suggestion (Petition at 9), *Keogh* and *Georgia* have not been undermined by recent amendments to the Interstate Commerce Act, particularly as applied to this case. The regulatory scheme applicable to the rates in issue here was completely intact through all of the relevant time period

[24] The *Keogh* Court stated that "rates somewhat lower [than those in the filed tariffs] might also have been reasonable." 260 U.S. at 161. In *Georgia*, the Court stated: "A 'zone of reasonableness exists between maxima and minima . . . .'" 324 U.S. at 460-61.

(1966-1981). From 1966 until the Motor Carrier Act of 1980 became effective on July 1, 1980, there were no statutory changes. Even after that time, while modified in other respects, the ICC's authority with respect to collectively-set rates such as those challenged by Petitioners was not diminished.[25] Those rates continue to be embodied in filed tariffs with which the carriers must comply, the ICC remains fully empowered to determine whether they are reasonable and nondiscriminatory, and the Commission may investigate, suspend, and invalidate such rates. 49 U.S.C. §§ 10701, 10704, 10708, 10741, 10761-10762 (1982). The exclusive authority of the ICC to regulate motor carrier rate levels and structures and to invalidate filed rates, which lies at the heart of this Court's holdings in *Keogh* and *Georgia*, is as vital today as it was in 1922 and 1945.

In sum, it is no more appropriate today than in 1922 and 1945 for shippers to circumvent the ICC's jurisdiction by seeking damages for allegedly excessive rates through the antitrust laws rather than through the procedures and unique standards of lawfulness established in the Interstate Commerce Act. It is no more appropriate today to ask a jury to speculate about how the ICC would have treated a hypothetical rate that a plaintiff claims should have been filed. And a shipper that paid the lawful, published rate—no more, no less—has no more suffered "legal injury" now than when this Court decided *Keogh* six decades ago.

CONCLUSION

This case raises no novel or important question of law. There is no inconsistency among the circuits on any issue relating to shipper antitrust damage claims, this Court

[25] The principal "deregulatory thrust" of the Motor Carrier Act of 1980 was to lower entry barriers and eliminate antitrust immunity for collective ratemaking on single-line rates after July 1, 1984. These amendments are not relevant to this case, and Petitioners do not claim that any of the rates in issue here were "deregulated."

has continually cited *Keogh* with approval, and Congress has expressed its intent to preserve the statutory interpretation articulated by this Court in *Keogh* and *Georgia*. Finally, just last term this Court declined to reconsider the *Keogh* doctrine, and approved a "harsh" new damage remedy under the Interstate Commerce Act for shippers harmed by illegal ratemaking. For all of the above reasons, the Petition should be denied.

Respectfully submitted,

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August 2, 1985

APPENDICES

APPENDIX A

Pursuant to Supreme Court Rule 28.1, Respondents provide the following information:

1. Bondy Cartage Limited is a wholly-owned subsidiary of Henry P. Bondy Holdings Limited, and is affiliated with Bondy Freight Lines Inc.

2. Dominion-Consolidated Truck Lines Limited is a wholly-owned subsidiary of Dominion-Consolidated Holdings Limited, which is wholly-owned by The Woodbridge Company Limited. Dominion-Consolidated Truck Lines Limited is affiliated with The Hudsons Bay Company, Thomson Newspapers Limited, International Thomson Organization Limited and Talcorp Limited.

3. ICL International Carriers Limited is a wholly-owned subsidiary of RBS Enterprises Limited, which is wholly-owned by Yellow Freight System, Inc. of Delaware.

4. Inter-City Truck Lines (Canada) Limited is a wholly-owned subsidiary of NM Davis Corp. Limited.

5. The Niagara Frontier Tariff Bureau, Inc. has no parent, subsidiary or affiliated corporations.

6. TNT Canada, Inc. is a wholly-owned subsidiary of All Trans Canada, Inc., which is wholly-owned by Thomas Nationwide Transport Limited of Australia. TNT Canada, Inc. is affiliated with Alltrans International Group, Inc.; Ansett Transport Industries Limited; McIllwraith, McEacharn Limited; Trans Freight Lines, Inc.; Transmodal Cargoes, Inc.; and Trans Ocean Leasing Corp.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. MDL 587

IN RE LOWER LAKE ERIE
IRON ORE ANTITRUST LITIGATION

This Document Relates to:

Civil Action No. 84-2135
JONES & LAUGHLIN STEEL, INC.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2079
REPUBLIC STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2134
NATIONAL STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2138
WHEELING-PITTSBURGH STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-5562
SHARON STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

MEMORANDUM AND PRETRIAL ORDER NO. 4

FULLAM, J. June 5, 1985

In this multidistrict litigation (MDL), 11 antitrust suits have been consolidated in this court for pretrial proceedings. Among the many motions now before the court are defendant railroads' motions to dismiss or, in the alternative, for a stay pending reference of certain issues to the ICC, filed in the actions brought by the steel company plaintiffs.[1]

The steel companies, Jones & Laughlin Steel, Inc. (Jones & Laughlin), Republic Steel Corp. (Republic), National Steel Corp. (National), Wheeling-Pittsburgh Steel Corp. (Wheeling-Pittsburgh), and Sharon Steel Corp. (Sharon), allege (as do all of the MDL plaintiffs with minor variations) that from the mid-1950s "until at least 1980" the railroad defendants (The Penn Cen-

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[1] This Memorandum does not address Penn Central's motions to dismiss, which rest on alternative grounds. Those will be addressed in a subsequent memorandum.

tral Corp., The Chesapeake & Ohio Railway Co., The Baltimore & Ohio Railroad Company, CSX Corporation, Bessemer and Lake Erie Railroad Co., Pittsburgh and Lake Erie Railroad Co., Consolidated Rail Corp., Norfolk & Western Railway Co., and Norfolk Southern Corp.) and other non-defendant railroads conspired to destroy competition and monopolize dock-handling, storage and land transportation of iron ore and other bulk commodities along lower Lake Erie.

Accepting as true all of plaintiffs' allegations, as I must on a motion to dismiss, the relevant facts are as follows. Much of the iron processed into steel by plaintiffs originates in mines located in Michigan, Minnesota, and Eastern Canada. The ore is shipped across the Great Lakes and unloaded at docks along lower Lake Erie in Pennsylvania and Ohio. Many of these docks were and still are owned by defendant railroads, and these docks were the primary handlers of iron ore. For many years, the prevailing method of unloading bulk commodities was by means of huletts, large cranes affixed to the docks. The huletts lifted the ore and other bulk commodities from the ships, known as "bulkers" or "straight deckers"; the cargo was then placed either in waiting railroad cars for immediate transportation or in a location designated for later movement to storage. During the period of the alleged conspiracy, rates for these services at all of the railroad docks were identical. The non-railroad docks in the vicinity were not equipped with huletts, and thus could not compete for iron ore traffic.

In the 1950s, some iron ore producers began to "pelletize" their ore. This innovation made possible the transport of iron ore by means of already existing self-unloading vessels. These vessels, as their name implies, were capable of unloading themselves by means of a conveyor belt. According to plaintiffs, the self-unloaders greatly lessened dock-handling time, and with the advent of "super-size" self-unloaders in the 1960s, these ships

could carry twice the load carried by the conventional bulkers and could unload themselves in one-fourth the time at docks with no special handling equipment. Plaintiffs claim that the railroads, loath to lose supremacy in the iron ore trade to non-railroad docks, and fearful of losing their substantial investments in potentially useless off-loading equipment, determined to halt the progress of self-unloader technology,[2] in part by keeping dock-handling rates for self-unloaders artifically high. The railroads charged the steel companies the same dock-handling rates for the self-unloaders as they did for the bulkers, thereby diminishing the economic attractiveness of water shipment by self-unloaders.

A further aspect of the alleged conspiracy involves line haul rates, which are the rates charged by the railroads for transporting the ore and other commodities from specific docks to the plaintiffs' mills. Plaintiffs charge that the rates from defendant railroads' docks to all the steel mill customers were identical, notwithstanding the difference in distances. Moreover, plaintiffs charge that the private commercial or non-railroad docks[3] were effectively precluded from handling ore from the self-unloaders by defendants' refusal to publish competitive commodity line haul rates[4] from the private docks to the steel mills,

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[2] Litton Industries, at one time a producer of self-unloading vessels, has brought suit against defendant railroads on grounds identical to those present in these cases. That case, proceeding in the Northern District of Ohio, was not consolidated for pretrial purposes with the other actions in this MDL.

[3] Those docks are represented in this litigation by Erie-Western Pennsylvania Port Authority and Codan Corporation. Pinney Dock and Transport Company is also pursuing an action against the defendant railroads in the Northern District of Ohio; that action was not consolidated for pretrial purposes with the other actions in this MDL.

[4] Commodity line haul rates are, in general, cheaper than class line haul rates. Plaintiffs claim that Pittsburgh and Lake Erie Railroad Company tried to take independent action in establishing

and the concomitant inhibition of truck competition for land transportation.

The steel company plaintiffs charge that, by the conduct eludicated above, defendants violated §§ 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1, 2, 3). Jones & Laughlin, Wheeling-Pittsburgh, and National also claim that this behavior gives rise to violations of the antitrust provisions of the District of Columbia Code (D.C. Code Ann. § 28-4501, 28-4502, 28-4503, 28-4508). All plaintiffs seek treble damages, attorneys fees, and costs pursuant to § 4 of the Clayton Act (15 U.S.C. § 15). Jones & Laughlin, Republic, and Wheeling-Pittsburgh also specifically seek injunctive relief pursuant to § 16 of the Clayton Act (15 U.S.C. § 26). (Sharon and National do not, but instead include a catchall request for other appropriate relief.)

I. PLAINTIFFS' CLAIMS FOR DAMAGES

Plaintiffs' damage claims are couched in terms of "denied savings," *i.e.*, they claim that the railroads' predatory behavior denied them (1) the across-the-board savings that would have resulted from swifter development of self-unloader technology; (2) the savings that would have resulted from lower dock-handling rates at private commercial docks had the self-unloader industry been more robust; (3) the savings that would have resulted from lower dock-handling rates at the railroad docks, had there been competition from private docks; (4) the savings that would have resulted from lower trucking rates, had such competition not been restrained; (5) the savings lost as a result of the railroads' artifically high line-haul rates; and (6) the savings plaintiffs would have realized had they had the option to choose the most effi-

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such competitive commodity line-haul rates in response to trucking competition in 1977, but was thwarted by pressure from other defendant railroads. Nevertheless, all railroads had published such competitive rates by March 1978.

cient and economical combination of transportation alternatives. *See, e.g.*, Complaint of National at ¶ 28.

Antitrust Immunity

The defendants in the present case are members of a protected and highly regulated industry, now charged with violating the antitrust laws. For the public good, participants in such industries are permitted a measure of freedom to cooperate with each other not enjoyed by those engaged in other endeavors, on the theory that the public's interest in preventing conspiracies in restraint of trade and monopolies must be partially subordinated to the public's need for the services being rendered. But, of course, this accommodation does not totally immunize the defendants from antitrust scrutiny.

The defendant railroads' limited antitrust immunity has two sources: the statutory immunity conferred by the 1948 Reed-Bulwinkle Amendment to § 5(a) of the Interstate Commerce Act (ICA) and the opinion of the Supreme Court in *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

Keogh was a manufacturer of excelsior and flax, who shipped his goods via defendant railroads. The railroads were members of an association through which uniform interstate rates were set. These rates had been duly filed with the Interstate Commerce Commission (ICC); moreover, the rates had been investigated by the Commission and found reasonable. Nevertheless, Keogh claimed that the rates were discriminatorily set by an unlawful conspiracy in violation of the antitrust laws.

The Court ruled otherwise; it held that the shipper could not recover treble damages "because he lost the benefit of rates still lower, which, but for the conspiracy he would have enjoyed." 260 U.S. at 162. Justice Brandeis, writing for a unanimous court, gave several reasons for this result. First, he noted that the "Act to

Regulate Commerce" (the ICA) is the proper vehicle for determining the legality of a rate. Under its enforcement provision (now at 49 U.S.C. § 11705), a shipper could receive actual damages and attorneys fees. He questioned whether Congress could have "intended to provide the shipper, from whom illegal rates had been exacted, with an additional remedy under the Anti-Trust Act." *Id.* at 162.

Second, Justice Brandeis stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. To rule otherwise, he concluded, would allow piecemeal discrimination in favor of shippers who chose to litigate. Finally, Justice Brandeis concluded that the damages sought were both hypothetical and speculative.

Plaintiffs here contest the application of *Keogh* to these cases, arguing that the immunity it provided was subsumed by the express immunity conferred by the Reed-Bulwinkle Act, that subsequent rulings of the Supreme Court demonstrate that *Keogh* is distinguishable on its facts from the present cases, and that its rationale is no longer compelling. For the reasons that follow, I reject plaintiffs' arguments.

The Reed-Bulwinkle Act amended the ICA to allow the railroads to enter into agreements to establish jointly rates, classes, routes, and the like, so long as these agreements are first approved by the ICC. *See* Pub. L. No. 80-662, 62 Stat. 472 (1948) (amending § 5(a) of the ICA) (current version *as amended* at 49 U.S.C. § 10706). In order to gain approval, such agreements must preserve the right of any party to act independently. *See* 49 U.S.C.

§ 10706(d)(2)(C). So long as the procedures set forth in the agreement for joint activity are followed, railroads are shielded from antitrust liability for that activity.[5] Under the statutory provisions in effect during the bulk of the alleged conspiracy period, any party, including the ICC, could initiate proceedings to determine whether the rates so promulgated were reasonable and/or whether they were issued pursuant to appropriate agreement procedures.[6] If the ICC concluded that the filed rates were improper for any reason, it could disapprove them and, if circumstances warranted, award the complainant its actual damages, together with costs and attorneys fees. *See* 49 U.S.C. §§ 10706, 10762, 11705.

An exhaustive review of the legislative history of the Reed-Bulwinkle Amendments is found in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, No. 84-7831 (2d Cir. Apr. 9, 1985), in which the court rejected every argument pressed by plaintiffs here, and concluded that

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[5] The defendant railroads are parties to the Eastern Railroads Agreement. *See* 277 ICC 279 (1950). The Coal, Coke and Iron Ore Committee (CCIOC) was established by defendants to carry out the agreement by, *inter alia*, meeting publicly to discuss and propose rates. Plaintiffs charge that defendants failed to comply with the agreement procedures in setting rates, although this charge is only a corollary to plaintiffs' larger concern with the railroads' predatory behavior.

[6] Significant changes have been made in the jurisdiction of the ICC by recent legislation. *See* The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); The Railroad Revitalization And Regulatory Reform (4R) Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976). Although the ICC's power to regulate rates has been curtailed, it still possesses the authority to ensure that rates are promulgated pursuant to approved agreements and to award damages, costs, and attorneys fees as reparation for illegal rates. In any event, much of the conspiracy here alleged occurred before the enactment of the amendments alluded to above, and plaintiffs have not suggested that these amendments are in any way outcome determinative.

the rule of *Keogh* is still valid.[7] In light of the admirable summary presented by Judge Friendly in *Square D*, I will present here only a brief capsulization of the relevant history. In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 401 (1945), decided shortly before the enactment of Reed-Bulwinkle, the Court held that *Keogh* barred Georgia from recovering treble damages in its *parens patriae* suit against defendant railroads for price-fixing on the basis of rates paid by private shippers. The Court noted, however, that *Keogh* was not a bar to government or so-called public antitrust actions against the railroad; nor did it prevent private shippers from obtaining injunctions against conspiratorial behavior, a matter not within the jurisdiction of the ICC. *See id.* at 454-55. Nor does *Keogh* apply to suits by competitors. *See, e.g., Pinney Dock and Transport Co. v. Penn Central Corp.*, No. C80-1733, slip op. at 46 (Memorandum and Order denying Motion to Dismiss) (N.D. Ohio Aug. 26, 1983).

There being a general consensus to the effect that the public would be better served by filling some of the gaps alluded to in *Georgia*, at least to the extent that railroads could not be subjected to antitrust liability by any entity for the appropriate joint setting of rates, routes, fares, classifications, etc., Reed-Bulwinkle was enacted. As Judge Friendly points out in *Square D*, Congress had been reminded of *Keogh* several times during the hearings that preceded the bill's enactment (*see Square D, supra*, slip op., at 3269-70), and nevertheless announced:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are*

[7] As transferee judge, I am bound to apply the law as if I were sitting in the transferor district. *See Manual for Complex Litigation* § 5.22 n.410 at 197 (2d ed. 1984). Hence, I am bound by the Second Circuit's determination in *Square D, supra,* in ruling on the present motion in the *Republic Steel* case, which was filed in the Southern District of New York. The other four cases were filed in the District of Columbia; I am aware of no binding precedent treating *Keogh* in that Circuit.

> *now applicable*, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body . . . .

H.R. Rep. No. 1100, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1848 (emphasis added).

Several courts have thus rightly held that *Keogh* was not swallowed up by Reed-Bulwinkle. *See, e.g., Square D, supra*; *In the Matter of Wheat Rail Rate Antitrust Litigation*, Nos. 84-1883, 84-1505 (7th Cir. Apr. 17, 1985). As I noted above, *Keogh* held that shippers could not pursue antitrust claims for treble damages against railroads on the basis of *filed rates* (although plaintiffs dispute this latter characterization, *see* discussion *infra*). Reed-Bulwinkle extended that protection by granting immunity against suits from *all* comers, not simply shippers, for all matters, not simply filed rates, that were jointly undertaken in compliance with an ICC-approved agreement; thus, the simple act of filing rates would not be sufficient to warrant Reed-Bulwinkle protection, but would, under the right circumstances, warrant *Keogh* protection. In view of Congress' expressed intention that Reed-Bulwinkle only add to the railroads' existing antitrust protection, it would be improper to shun *Keogh* on this basis.

Finally, as Judge Friendly noted:

> Beyond this, the legislative history contains no suggestion of any intention to overrule *Keogh*, and it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect.

Square D, supra, slip op. at 3269.

Plaintiffs next contend that their cases do not fall within the proscriptions of *Keogh*, since (1) *Keogh* was a "rate" case, and in this case a much broader conspiracy

is alleged, rates being only a "symptom" of the problem, and (2) the rates in *Keogh* had been approved by the ICC, whereas the rates charged here were simply filed with the ICC, thus occasioning no conflict between agency and court jurisdiction.

I do not find these arguments persuasive. Although it is true that the conspiracy alleged goes farther than the mere fixing of rates, that does not divest the court of its duty to ensure that antitrust immunity is afforded as the law directs. The attempts of both sides of this litigation to label it as a rate matter or a monopolization matter do little to advance the inquiry. I am aware of no law that dictates that I view these actions with tunnel vision; on the contrary, a legal line has been drawn by the *Keogh* court which I am not free to cross, no matter how "artificial" it may seem to plaintiffs. *See, e.g., Square D, supra,* slip op. at 3248-49, 3282 ("A shipper [should be allowed to amend its complaint and] may recover damages if it can show that carriers caused injury to the shippers' business or property other than by higher tariffs, such as by impeding its ability to transport its goods to other markets and thus decreasing its sales."). The portion of plaintiffs' damage claims which involves rates must, under *Keogh*, be separated from the rest of the action.

And this is so whether the rates at issue have been approved by the ICC or simply filed with that body. *See, e.g., Square D, supra,* slip op. at 3280. As noted above, Justice Brandeis clearly stated in *Keogh* that the filed rate is "the legal rate" under the ICA unless and until the rate is disallowed by the ICC or otherwise displaced. 260 U.S. at 163. Notwithstanding this straightforward language, plaintiffs argue that subsequent Supreme Court decisions have revealed that ICC approval is a prerequisite to *Keogh* immunity. In *Hanover Shoe, Inc. v. United Shoe Machinery, Inc.*, 392 U.S. 481 (1968), the Court rejected the "passing on" defense to claimed overcharges in antitrust suits. The *Hanover* Court took note of *Keogh*

in a footnote, since Justice Brandeis had appeared to give credence to that defense. He wrote that the same legal rate had been exacted from all shippers, and that a lower rate (one that would have existed but for the conspiracy)

> might not have benefitted [*Keogh*] . . . . Under these circumstances, no court or jury could say that, if the rate had been lower, *Keogh* would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Keogh, 260 U.S. at 165. The *Hanover* Court stated that in *Keogh* "[b]ecause the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws . . . . We ascribe no general significance to the *Keogh dictum* for cases where the plaintiff is free to prove that he has been charged an illegally high price." *Hanover*, 392 U.S. at 491 n.8. It is thus clear that the concern of the *Hanover* Court was to distance itself from one of several arguments advanced by Justice Brandeis in support of his ruling in *Keogh*. The Court did not, and indeed had no need to focus on the issue of filed rates versus approved rates. Hence, it would be folly to hold that the dictum in *Hanover* rejecting the dictum in *Keogh* in any way detracts from the holding of the latter.[8]

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 20 (1966), the Court held that a shipper in foreign commerce could maintain an antitrust action

[8] The same may be said with respect to *Terminal Warehouse Co. v. Pennsylvania R.R. Co.*, 297 U.S. 500 (1936), which the plaintiffs argue is inconsistent with *Keogh*. But, although the *Terminal Warehouse* Court found *Keogh* "apposite and helpful", it stated that it was not "decisive". *Id.* at 511. Its musings regarding when an antitrust action may be pursued by a shipper are *dicta* and cannot be constructed to alter *Keogh*. *Id.* at 515.

for treble damages against maritime conferences and their members based on rates set without prior approval of the Federal Maritime Commission (FMC) pursuant to the Shipping Act. The Shipping Act, like the ICA, provides the commercial maritime industry with limited antitrust immunity for rates jointly set in accordance with FMC-approved agreements. *See* 46 U.S.C. § 814. Without mention of *Keogh*, the Court held that if rates were set pursuant to an unapproved agreement, the carriers could be subjected to antitrust liability for joint rate-setting. Paying due heed to the doctrine of primary jurisdiction, the Court concluded that such an antitrust action, whether for damages or for an injunction, should be stayed pending the FMC's resolution of whether the rates were set in conjunction with an approved agreement. *Id.* at 221, 223. If the FMC should find that the rates were not lawfully set, the shipper would then have the option of seeking recovery under the Shipping Act or under the antitrust laws. *Id.* at 224.

The shippers in the present cases do not overtly argue that *Carnation* overrules *Keogh sub silentio*, but that it limits its application to approved rate cases. But the *Carnation* Court was concerned with unapproved *agreements*, not unapproved *rates*.[9] Moreover, it was construing an exemption contained not in the ICA, but in the Shipping Act, a statute which, albeit similar in many respects to the ICA, is not at issue in the present cases. Nor was the *Keogh* Court confronted with a statutory exemption of any kind, since none existed in the ICA at that time.

Hence, I must reject plaintiffs' contention that *Keogh* does not apply to this case, and with it their arguments regarding the changing regulatory climate. *Keogh* con-

[9] Indeed, one might venture that if *Keogh* were to be read as an approved rate case, the *Carnation* Court would have cited it as support for its position that in un- or dis-approved rate cases, an antitrust action could lie.

tinues to be cited by the Court as good law. *See, e.g., ATA v. McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980). *See also Minsky v. Auto Driveaway Co.*, 757 F.2d 718 (7th Cir. 1984); *Square D, supra; Wheat Rail Cases, supra; Essential Communication Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979). Although plaintiffs may well be correct in arguing that the Supreme Court would elect to overrule *Keogh* if it had the opportunity to do so today, that is not for this court to decide.

Thus, insofar as plaintiffs' damage claims are based on rates charged the plaintiffs by defendant railroads—all dock-handling and storage rates at railroad docks and railroad line haul rates (class or commodity) from private and railroad docks—their claims will be dismissed.

As I read the various complaints, this leaves the steel companies with two presently animated antitrust claims: (1) that they could have paid lower dock-handling rates (sooner) to the private docks than they did to the railroad docks if the railroads had not retarded the development of the self-unloader industry; and (2) that they could have paid lower land transport rates (sooner) to the truckers, had the railroads not restrained competition by that industry and monopolized line-hauling from their docks.[10] In my view, plaintiffs' generalized claims regarding savings they would have realized had defendants not impeded self-unloader development and had they been able to choose the most economic combination of

[10] In Jones & Laughlin's summary of facts, presented to the transferor court but not alluded to in its present motion to dismiss, it contends that the railroads intended to "cramp" the trucking industry by, *inter alia*, threatening "elimination of services to steel companies." Puzzingly, however, no such allegation of a refusal to deal by the railroads is found in any of the present steel company complaints, nor for that matter, in the complaints of the trucking companies. Hence, none is now properly before the court.

transportation alternatives come within these two categories.

Defendants vigorously contest plaintiffs' standing to pursue these remaining claims.

B. *Antitrust Standing*

The definition of who may be an antitrust plaintiff has been an elusive one. From the wording of § 4 of the Clayton Act (15 U.S.C. § 15), one might not have imagined that such a problem would evolve:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

Read literally, this all-encompassing language would seem to contemplate litigation recoveries by all who claim to have suffered any form or degree of antitrust injury. But the courts do not read this section literally; indeed, over the years, the appellate courts have devised a variety of tests, through which prerequisites for maintaining suit beyond the simple allegation of injury have been engrafted upon this language. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964, n.12 (3d Cir. 1983) (and cases cited therein).

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Supreme Court attempted to harmonize the various standards by setting forth a list of factors which are to "circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 357. As elucidated by our court

of appeals in *Merican, supra*, those factors are (1) the causal connection between the alleged antitrust violation and the harm to plaintiff (specific intent to harm plaintiff is not required); (2) the nature of plaintiff's injury (Is it the sort of injury Congress intended § 4 to address, and does it flow from the unlawful nature of defendant's acts?); and (3) the directness or indirectness of the injury. *Merican*, 713 F.2d at 964-65 & nn.13-15 (citing *Associated General Contractors*, 459 U.S. at 537-40).

The latter factor requires an analysis of (a) whether there exists "an identifiable class of persons whose self-interests would normally motivate them to vindicate the public interest"; (b) the speculative nature of the damages; (c) the potential for duplicative recovery; and (d) the danger of the court becoming involved in complex apportionment of damages. *Associated General Contractors*, 459 U.S. at 541-44; *Merican*, 713 F.2d at 965 n.15. This final set of considerations is precisely the one focused upon in *Hanover Shoe, Inc., supra*, and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); in *Hanover*, the Court rejected the "passing on" (of the overcharge) defense to the claim of an innocent middleman in a price-fixing scheme, and in *Illinois Brick*, the Court completed its thought: it barred the indirect purchaser from maintaining an antitrust action based on the overcharge.

Although plaintiffs clearly allege the requisite form of injury, and thereby satisfy the second requirement of *Associated General Contractors*, their claims cannot withstand the scrutiny mandated by factors 1 and 3.

With respect to factor 3, the Third Circuit's opinion in *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979), is instructive. The *Mid-West Paper* court applied the *Hanover Shoe-Illinois Brick* rationale to a case without a middleman,[11] a case ana-

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[11] Criticism of the *Mid-West Paper* court should now be abated in light of the ruling in *Associated General Contractors* to the effect that these factors are of concern in any antitrust case.

logous in many respects to those presently under consideration. The court held that a customer of a non-conspiring competitor of defendant supplier could not maintain an antitrust action based on an "umbrella" pricing theory (*i.e.*, the notion that the effect of defendant's conduct in an oligopolistic market was to inflate the prevailing market rates charged by all competitors in the relevant market, and not simply by defendant). In an analysis which mirrors that prescribed by *Associated General Contractors*,[12] the court conceded that the nature of plaintiff's injury was within the reach of the antitrust laws (factor 2), but ruled that the chain of causation was too speculative (factor 1) and the amount of the damages too conjectural (factor 3). *Id.* at 584. Said the Court:

> The outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural. As noted in *Hanover Shoe*, "[a] a wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact; . . . ."

Id.

The *Mid-West Paper* opinion was not met with universal agreement (*see, e.g., In re Uranium Antitrust Litigation*, 552 F. Supp. 518, 523 (N.D. Ill. 1982) (and cases cited therein).[13] Nevertheless, I am persuaded that

[12] The *Mid-West Paper* analysis was cited with approval by the post-*Associated General Contractors Merican* court. *See* 713 F.2d at 965 n.15.

[13] But neither the Second Circuit nor the District of Columbia Circuit has rejected *Mid-West Paper*; indeed, the Second Circuit embraced its reasoning in *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981). Hence, I perceive no problem with alluding to it here. *See* n.7 *supra*.

the *Hanover Shoe-Illinois Brick* rationale applies with even more force in the present circumstances (where plaintiffs are only potential customers of non-conspiring competitors) than in the *Mid-West Paper* scenario. With respect to plaintiffs' first claim—that they could have paid less sooner to the private dock owners had the railroads not retarded the development of self-unloaders—the plaintiffs ask the court to engage in an exercise in prophecy. I have not lost sight of the fact that plaintiffs claim they can prove that the private docks did charge less than the railroads when they finally began to avail themselves of the self-unloaders. Nevertheless, had the railroads not interfered, when would the private docks have begun to handle the self-unloaders? Moreover, even if a date could be pinpointed with reasonable accuracy, there is no assurance that the rate charged would be the rates alluded to by plaintiffs. As the *Mid-West Paper* court observed, quoting *Hanover Shoe*, "[a] wide range of factors influence a company's pricing policies." 596 F.2d at 584 (quoting 392 U.S. at 492). This is precisely the sort of complex apportionment of damages which the Supreme Court has warned must be avoided. Furthermore, there exist in this litigation two identifiable classes which are actively pursuing their antitrust remedies against the defendants—the self-unloader manufacturer, Litton, and the non-railroad dock owners, Pinney and Erie-Western.

I also note my firm belief that these damages are actually claims for overcharge in other clothing.[14] Although plaintiffs claim to be seeking recovery for "lost savings," this is only an exercise in semantics. What plaintiffs actually seek is reimbursement for the inflated rates they suffered as a result of defendants' predatory practices;

[14] The tortured nature of the description of the surviving claims is probably in direct proportion to the tenuousness of their causation. In any event, I need not rule on this factor in view of the findings expressed above.

while this brings plaintiffs out from under the constraints of *Illinois Brick* (*i.e.*, they are no longer indirect potential purchasers), it runs them squarely into the brick wall of *Keogh*.[15]

I need not repeat the above analysis with respect to plaintiffs' claim for denied savings on truck hauling because of defendants' conspiratorial and monopolistic behavior; it is the same. I will only add that five trucking concerns are currently pursuing their antitrust remedies against the defendants in this MDL.

All of plaintiffs' damage claims must therefore be dismissed. But plaintiffs will be granted leave to amend their damage claims in accordance with this Memorandum, if it is possible for them to do so. *See Square D*, slip op. at 3248-49 (quoted at p. 12 *supra*).

II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF

Neither *Keogh* nor the antitrust standing restrictions that have grown out of § 4 affect plaintiffs' ability to

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[15] No matter which view is taken of these claims, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which plaintiffs advance in support of their position, is inapposite. In *McCready*, plaintiff challenged Blue Cross' policy of refusing to reimburse subscribers for fees paid to psychologists for psychotherapy, while at the same time reimbursing such fees when paid to psychiatrists. The Court noted at the outset that the *Illinois Brick* rationale did not apply since there was no risk of duplicative recovery and nothing speculative about the damages (precisely equal to McCready's out-of-pocket expenses). Moreover, the court observed that McCready's injury was not remote, since "it was a necessary step in effecting the ends of the alleged conspiracy." *Id.* at 479. *McCready* is readily distinguishable from the present litigation since here the indirect damages are clearly speculative and since the savings allegedly denied the plaintiffs did not constitute a "necessary step" in the effectuation of the conspiracy—they are consequential. And I note, parenthetically, that *McCready* cannot be construed to impinge on the holding of the later-decided *Associated General Contractors, supra.*

maintain actions for injunctive relief (although, curiously, no one has addressed this issue). *See, e.g., Square D*, slip op. at 3280-81; *Weiss v. York Hospital*, 745 F.2d 786, 806-07 (3d Cir. 1984). The only possible complication with respect to this issue is whether the discretionary doctrine of primary jurisdiction requires that the actions be stayed pending referral to the ICC. In my view, neither stay nor referral is required.

The policy underlying primary agency jurisdiction is to avoid conflict between the roles of court and agency, and to utilize special agency expertise while conserving the resources of the court. In these actions, plaintiffs seek a finding that defendants' conduct violated antitrust laws and an injunction ordering an end to that behavior and barring defendants from resorting to such illegal combinations in the future. The ICC does not have the power to issue such an injunction. *See Georgia*, 324 U.S. at 454-55, *cited in Square D*, slip op. at 3281. Moreover, there are no underlying facts to be established that could best be sifted by the ICC; the issue here is not whether the railroads conformed to a rate agreement, but whether they engaged in a broad-based conspiracy. As a panel of the District of Columbia Circuit noted in the criminal adjunct to this civil litigation:

> [Reed-Bulwinkle] immunity reaches only those actions factually taken "in conformity with" the rate agreement and the terms and conditions laid down by the ICC. It does not sweep within it a larger conspiracy which utilizes a Section 5a rate bureau as a means to an end; it does not legitimate illegal schemes which happen to coincide at points with the legitimate actions of a rate bureau.

United States v. Bessemer and Lake Erie R.R. Co., 717 F.2d 593, 600 (D.C. Cir. 1983).

In view of this, I perceive no reason why the matter, now devoid of all rate-based damage claims, should be

referred to the ICC; plaintiffs may proceed with their claims for injunctive relief.[16]

III. DISTRICT OF COLUMBIA CLAIMS

Plaintiffs Jones & Laughlin, National, and Wheeling-Pittsburgh also charge defendants with violations of the antitrust laws of the District of Columbia. *See* D.C. Code Ann. §§ 28-4501, 28-4502, 28-4503, 28-4508. Defendants assert that these pendent claims must be dismissed since (1) the D.C. Code must be construed in a manner consistent with federal law (which, in light of the conclusions expressed above, would leave standing plaintiffs' injunction claims); (2) none of the trade or commerce alleged to have been restrained is within the District of Columbia; and (3) application of the D.C. Code to these cases would violate the Commerce Clause of the U.S. Constitution.

In my view, defendants' second argument is dispositive; in order to obtain relief under District of Columbia law, plaintiffs must allege that defendants' conduct restrained trade in the District. That law provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, all or any part of which is within the District of Columbia, is declared to be illegal.

D.C. Code Ann. § 28-4502. Section 28-4503 provides:

> It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia.

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[16] Although, as I noted above, neither Sharon nor National specifically requested injunctive relief, they did include catch-all requests and predicated the court's jurisdiction, *inter alia*, on 15 U.S.C. § 26 (§ 16 of Clayton Act) which addresses injunctive relief. Hence, their complaints will be construed to include such claims.

In my view, the above-quoted language, read together and individually,[17] clearly requires that, before the alleged offensive conduct can rise to the level of an antitrust violation, it must restrain trade or commerce in the District of Columbia.

In so construing the statutes to require local effect as a jurisdictional prerequisite, I do nothing unusual. I note first that the stated purpose of the law is "to promote the unhampered freedom of commerce and industry throughout the District of Columbia by prohibiting restraints of trade and monopolistic practices." D.C. Code Ann. § 28-4501(b). Clearly, the concern is with local trade.

Second, this chapter of the Code also provides that

> [i]t is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.

Id. § 28-4515. Section 1 of the Sherman Act is a comparable antitrust statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce among the several states, or with foreign nations*, is declared to be illegal . . ." (emphasis added). Federal courts routinely construe the emphasized language as a jurisdictional prerequisite which must be pleaded. *See, e.g., McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

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[17] Admittedly, a strained reading of § 28-4501 could lead one to conclude that any conspiracy, etc., any part of which occurs in the District, which has as its effect the restraint of trade anywhere (in or out of the District), is illegal. But the language of the next section counsels that such an interpretation would be unwise; for various reasons of grammatical immutability, it clearly demonstrates that the phrase "all or any part of which is within the District of Columbia" is meant to modify "trade or commerce," and not "contract, combination . . . or conspiracy." *See also* the following discussion in the text on the chapter's purpose and proposed rules of construction.

In this regard, plaintiffs' complaints are lacking. In their complaints, they allege that all of the defendants reside, are found, transact business, or have agents in the District of Columbia. This allegation may suffice for Sherman Act venue purposes,[18] but clearly does not support plaintiffs' claims for breach of the substantive law of the District of Columbia. In further support of venue in the District, Jones & Laughlin and Wheeling-Pittsburgh (but not National) do allege that "[c]ertain of the unlawful acts alleged herein were performed *or had effects within the District of Columbia*." Complaints of Jones & Laughlin and Wheeling-Pittsburgh, ¶ 2 (emphasis added). But in those portions of their complaints entitled "Trade and Commerce", these plaintiffs (and National) state only that "[t]he violations of law alleged herein occurred in and substantially and adversely affected interstate and foreign commerce." *Id.* at ¶ 14; *see also* complaint of National, ¶ 9.

National thus makes no allegation of restraint of trade in the District of Columbia, while the allegations of Jones & Laughlin and Wheeling-Pittsburgh in that regard are, at best, ambiguous. In response to the present motions to dismiss, the latter argue only that they have "alleged a *conspiracy* which took place, at last [sic] in part, within the District of Columbia." [19] Brief of Jones & Laughlin

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[18] In so stating, I express no opinion on the motions of Norfolk and Western Railway to dismiss the *Jones & Laughlin* and *Wheeling-Pittsburgh* actions for lack of venue. That motion will be addressed in a subsequent Memorandum and Order.

[19] Jones & Laughlin points out in its summary of facts that in the companion criminal case, it was established that two overt acts evidencing the conspiracy occurred in the District of Columbia: (1) the filing of tariffs with the ICC and (2) a meeting of the conspirators on July 6, 1976, to discuss trucking competition. Summary at 30. Even assuming that I could properly take note of these "facts", plaintiffs' claims would still be deficient, since, in my view, the fact that a part of the conspiracy occurred in the District of

at 76 (emphasis added). Curiously, in response to defendants' square challenge on the issue, plaintiffs do not even allude to the "effects" language contained in the venue allegations of their complaints.

Hence, I conclude that none of the three plaintiffs has properly pleaded its District of Columbia claims. Those claims will therefore be dismissed, but with leave to amend.

An appropriate Order follows.

Columbia (while perhaps sufficient to establish venue, *but see* n.18 *supra*) is in itself insufficient to state a claim under District law. *See* n. 17 *supra*.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. MDL 587

IN RE LOWER LAKE ERIE
IRON ORE ANTITRUST LITIGATION

This Document Relates to:

Civil Action No. 84-2135

JONES & LAUGHLIN STEEL, INC.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2079

REPUBLIC STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2134

NATIONAL STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2138

WHEELING-PITTSBURGH STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-5562

SHARON STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

ORDER NO. 4

AND NOW, this 5th day of June, 1985, in consideration of the motions of defendants Chesapeake & Ohio Railway Co., Baltimore & Ohio Railroad Co., Norfolk & Western Railway Co., Norfolk Southern Corp., Pittsburgh & Lake Erie Railroad Co., Bessemer & Lake Erie Railroad Co., Consolidated Rail Corp., and CSX Corp. to Dismiss the above-captioned actions or for a Stay Pending Reference of Certain Issues to the ICC, and the responses and replies thereto, it is ORDERED.

1. Defendants' Motions are hereby GRANTED with respect to plaintiffs' claim for damages, costs, and attorneys' fees. Said claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

2. Defendants' motions are hereby DENIED with respect to plaintiffs' claims for injunctive relief.

3. Defendants' motions are GRANTED with respect to the claims of plaintiffs' Jones & Laughlin, Wheeling-Pittsburgh and National for relief pursuant to the Dis-

trict of Columbia Code. Said claims are DISMISSED without prejudice. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

John P. Fullam
J.

Entered: 6-6-85
Clerk of Court

(4)

No. 85-21

Supreme Court, U.S.
FILED
AUG 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN REPLY TO THE UNITED STATES AS AMICUS CURIAE

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August 14, 1985

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TABLE OF AUTHORITIES

Cases	Page
Georgia v. Pennsylvania Railroad, 324 U.S. 439 (1945)	*passim*
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	2
ICC v. American Trucking Associations, Inc., 104 S. Ct. 2458 (1984)	3, 5
In re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112	3
Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922)	*passim*
Minsky v. Auto Driveaway, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984)	3
Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)	2
Patsy v. Board of Regents, 457 U.S. 496 (1982)	3, 4
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347 (2d Cir. 1985)	2, 5
United States v. Auto Driveaway Co., 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981)	3
Statute and Legislative Materials	
Motor Carrier Act of 1980, 49 U.S.C. § 10706 (b) (3) (D) (1982)	4
131 Cong. Rec. E3801 (daily ed. Aug. 1, 1985)	5
Miscellaneous	
Brief for the United States and the FERC as Amici Curiae, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981)	2
Reply Brief for the Petitioners, *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984)	5
Traffic World, Aug. 12, 1985	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN REPLY TO THE UNITED STATES AS AMICUS CURIAE [1]

The United States, as amicus curiae, argues that this Court should reconsider the issue settled in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), and *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945). Brief for the United States as Amicus Curiae at 6 ("Amicus Brief").

1. Amicus does not argue that the Court misconstrued the relevant statutes or misperceived the intent of Congress when *Keogh* and *Georgia* were decided. Nor does Amicus dispute that *Keogh* is settled law that has been

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[1] Respondents' Rule 28.1 information is included as Appendix A to the Opposition Brief.

applied by the courts with consistency over the past 60 years and never overruled by Congress despite numerous opportunities. Rather, it contends that the *Keogh/Georgia* holdings lack congruence with contemporary regulatory and judicial philosophies.[2]

In advancing reformist arguments,[3] Amicus ignores the fundamental policy of *stare decisis*, which lends predictability and integrity to the law and ensures a proper allocation of functions between the courts and the political branches. Under that principle, the policy choices associated with Amicus' desire to recast settled law are for

[2] Particular reliance is placed upon the presumption against implied immunity, Amicus Brief at 10-14, which, as discussed in our Opposition Brief at 12-14, neither post-dates *Keogh* and *Georgia*, nor was a stranger to those cases. The government also argues that "it strains credulity" to hold, as the Second Circuit did below, that an implied immunity can exist where express immunity has been enacted by Congress. Amicus Brief at 11. However, this Court has found implied antitrust immunity even where the express immunity provisions of the statute were not applied to the conduct in question. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385 & n.14 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304, 312-13 (1963). This finding is particularly appropriate where, as here, the implied immunity antedated the express immunity, and Congress stated its intent to preserve that implied immunity. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1359-60 (2d Cir. 1985); Opposition Brief at 9-11.

[3] The portrayal of *Keogh* as an anachronism (Amicus Brief at 17-18) is belied by the facts that (1) Congress has not seen fit to dispense with the rate regulation that underlies *Keogh*, (2) the ICC today has exactly the same powers over the motor carrier rates at issue here as it always had (*see* Opposition Brief at 15-16), and (3) the Commission reviews every general rate increase, including those proposed by Respondents. Nor does Amicus' position square with recent decisions of this Court. *See* Opposition Brief at 13 n.18. Indeed, the Solicitor General argued in one of those cases that rates filed with a regulatory agency are inviolate in a civil damage action, and this Court accepted the proposition. Brief for the United States and the FERC as Amici Curiae at 8, 10, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

Congress, not the courts. *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496 (1982).[4] For example:

a. If there is to be a treble damage penalty for rate bureau infractions, should such sanction apply equally to the entire range of non-immune rate bureau activity, from substantial, intentional misdeeds (such as those prosecuted criminally in *Minsky*) to technical violations (such as the one on which the ICC refused to base a damage award in *Wheat Rail*)?[5]

b. Under *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458, 2466-68 (1984), the ICC must determine whether and to what extent the rate bureau agreement approved by the Commission has been violated and, if so, whether such violation is significant or trivial and whether damages are appropriate. Congress might well reject the application of antitrust rules that disregard the regulatory agency's primacy in this area.

c. The government suggests blithely that improper speculation by juries as to how the ICC would decide the hypothetical rate issue in antitrust damage actions may be reduced by referring the question to the Commission, but never explains how such a system would work. Amicus Brief at

[4] In *Patsy*, this Court granted *certiorari* because the lower court ignored *stare decisis*. The Court held that policy considerations warranting changes in statutory remedies are matters for Congress, and reversed the lower court. 457 U.S. at 512-15; *id.* at 516-17 (O'Connor, J., concurring); *id.* at 517 (White, J., concurring) ("whether or not this initially was a wise choice, [prior] decisions are *stare decisis*").

[5] *See Minsky v. Auto Driveaway*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984); *United States v. Auto Driveaway Co.* 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981); *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112; *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458, 2468 n.13 (1984).

8. At present, there is no statute that permits this type of referral, no judicial decisions that authorize referral of hypothetical questions concerning *non-existent* rates, and no framework for determining how the reference procedure would be integrated into an ongoing jury trial.

d. Congress may well wish to mitigate the potentially harsh consequences of expanding treble damage exposure through the use of a phase-in period or other transition measures, as it has done in virtually every "deregulation" statute cited by the government.[6]

Resolution of these policy issues requires the type of political compromise, balancing and fine-tuning that are the traditional functions of the legislative branch, for sound reasons. As the Court noted in *Patsy*: "These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary . . . ." 457 U.S. at 514.

2. If after the passage of 60 years the Government now wants to change settled law, the executive branch enjoys ready access to Congress for that purpose. In the past decade, representatives of the Department of Justice, the Department of Transportation and the ICC have actively participated in the political process that produced five amendments to the Interstate Commerce Act. As part of that process, these representatives presented their policy views to Congress on no fewer than 114 occasions. *See* Appendix. Yet not one of these officials has ever asked Congress to overrule the *Keogh* doctrine, which the Government here argues is an issue of "substantial importance to the economy." Amicus Brief at 18

[6] For example, the Motor Carrier Act of 1980 reduced the scope of antitrust immunity for collective ratemaking effective four years from the date of the Act. 49 U.S.C. § 10706(b)(3)(D) (1982).

n.21.[7] Be that as it may, the executive branch remains free today to seek any such changes from the legislature.[8]

3. The Government acknowledges, as it must, that *Keogh* does not curtail the law enforcement authority of the United States, but nevertheless seeks to justify *certiorari* on the ground that the vigilance of shippers in policing rate bureau compliance, if coupled with the right to sue for antitrust damages, would be of "importance to the economy." Amicus Brief at 18 & n.21. Just last year, in *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984), the United States argued to this Court precisely the opposite—that because of *Keogh* and its restriction on treble damages recovery, the ICC required broad power to nullify rates retroactively, and to award shippers damages under the Interstate Commerce Act for rate bureau violations. Reply Brief for the Petitioners at 4-5, *ATA*; *see* 760 F.2d at 1364 n.12. Now that the Court has accepted the Government's position that the Motor Carrier Act of 1980 contemplated a shipper remedy for illegal ratemaking that is potentially "ruinous" to carriers and even more harsh than antitrust damages, 104 S. Ct. at 2467, there can be no credibility in the claim that remedies under the Interstate Commerce Act are

[7] Unlike Petitioners, the United States does not contend that Congress intended to overrule *Keogh* by the Motor Carrier Act of 1980 or the Reed-Bulwinkle Act of 1948. *See* Amicus Brief at 11 n.12.

[8] Indeed, the issues underlying the *Keogh* doctrine are currently before the Congress. Legislation was recently introduced in the House that, except as to transportation of passengers and household goods, is intended to end all ICC regulation of interstate motor carrier rates and tariffs, and eliminate ICC authority to grant antitrust immunity for motor carrier rate bureaus. *See* 131 Cong. Rec. E3801 (daily ed. Aug. 1, 1985) (statement of Rep. Moody). In the Senate, oversight hearings on the Motor Carrier Act of 1980, in which the ICC is scheduled to participate, are set for September 9, 1985. *Traffic World*, Aug. 12, 1985 at 8.

istration. Nor would the legislation change current statutory provisions requiring DOT to set financial responsibility requirements, such as insurance.

Consumers and shippers both will further benefit from removal of the last economic restrictions on trucking, Dole said, because "motor carriers will be permitted to carry whatever commodities they choose, over whatever routes they choose, at whatever rates are mutually agreeable to them and to their customers." She added that numerous studies show that the overwhelming majority of even the most rural shippers are receiving trucking service at least as good as it was before reforms began.

Under the proposed trucking legislation, consumer protection in household goods carriers' operations would be transferred from the ICC to the Federal Trade Commission.

The legislation would also:

* Eliminate all remaining ICC regulation of trucking rates and carrier entry into the business.
* Eliminate antitrust immunity for collective ratemaking.
* Eliminate the "common carrier" obligation.
* Prevent states from imposing new regulations on operations that previously were regulated by the ICC.
* Eliminate all ICC truck leasing rules.
* Eliminate tariff publication requirements.

Initial partial deregulation of the trucking industry has been in place for five years. President Reagan called for further motor carrier deregulation in his State of the Union message last January.

At the same time she sent the trucking legislation to Congress, the Secretary forwarded legislation proposing

to eliminate all Interstate Commerce Commission regulation of the surface freight forwarder industry and on domestic water carriers.

The freight forwarder bill is similar to the trucking proposal. It would remove ICC jurisdiction and would eliminate antitrust immunity for the freight forwarders.

The water carrier legislation proposes to eliminate all ICC jurisdiction over domestic water carriers—barges, intercoastal and Great Lakes carriers. Because of exemptions in these areas, the ICC currently regulates less than ten percent of water carriage.

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

Sep. 12, 1985

The Honorable George Bush
President of the Senate
Washington, D.C. 20510

IDENTICAL LETTER TO:
The Honorable Thomas
P. O'Neill, Jr.
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. President:

Economic regulation of the transportation industries began some ninety-eight years ago. While this regulation may have served the national interest well for a long time, much of it has now become an expensive paper chase with no offsetting benefits to consumers. It is now time to eliminate those elements of economic regulation which no longer provide any benefits to shippers or consumers. To accomplish this purpose I am transmitting three bills:

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes";

"To amend subtitle IV of title 49, United States Code, to reduce regulation of surface freight forwarders and brokers, and for other purposes"; and

"To amend subtitle IV of title 49, United States Code, to reduce regulation of interstate water carriers, and for other purposes."

These bills, entitled, respectively, the Trucking Deregulation Act of 1985, the Surface Freight Forwarder Deregulation Act of 1985, and the Interstate Water Carrier Deregulation Act of 1985, eliminate Interstate Commerce Commission regulation of those industries. The three bills are designed to build on the regulatory reforms effected in recent years through administrative changes made by the Interstate Commerce Commission (ICC), and through the legislative reforms provided by the Motor Carrier Act of 1980 and the Household Goods Transportation Act of 1980.

In the case of *motor carriers of property*, these reforms have worked extremely well. They have removed a considerable regulatory burden on the trucking industry, permitting carriers to increase the efficiency of their operations and to respond more rapidly and effectively to changing market conditions. These companies now compete relatively freely with each other because of liberal entry and operating restriction removal procedures. There is a more competitive environment, with more service and rate options for shippers, in many cases even for small shipments. The great majority of shippers believe the reforms have been advantageous to them. In sharp contrast to the arguments of opponents of reform that service to small communities would suffer, numerous studies show that the overwhelming majority of rural

small town shippers are getting service at least as good as before the reforms.

These reforms comprised a good first step in the right direction. It is now time to take the necessary final steps to complete deregulation of the trucking industry.

The bill builds on the evidence and recommendations of the Motor Carrier Ratemaking Study Commission, by eliminating the antitrust immunity now enjoyed by the trucking industry. The evidence compiled shows clearly that such immunity has raised rates unnecessarily and has not prevented undue discrimination.

The entry and rate regulation of the trucking industry that currently remains is unneeded and undesirable because there is ample competition within the trucking industry as well as competition from other modes. Such regulation suppresses managerial initiative and innovation, and wastes valuable taxpayer dollars and resources that the trucking industry could employ more usefully in improving its productivity.

Freight forwarders and *brokers* are intermediaries who arrange transportation for others. There is no justification for the continued regulation of either brokers or freight forwarders, as there is ample competition not only among and between them, but also competition from trucking companies and unregulated shipper associations.

Interstate water carriers have nominally been regulated by the Interstate Commerce Commission since the Transportation Act of 1940. However, as a result of numerous exemptions, ICC water carrier regulation applies to less than ten percent of interstate water transportation. The ICC-regulated intercoastal, inland waterways and Great Lakes transportation markets have no public utility basis for regulation, as numerous water carrier competitors exist, entry is easy, and investment requirements are relatively modest. Thus, the continued regulation of domestic water carriers is unneeded.

The Office of Management and Budget has advised that enactment of this proposed legislation would be in accord with the President's Program.

Sincerely,

/s/ Elizabeth
ELIZABETH HANFORD DOLE

13 Enclosures

4 Summaries
3 Charts
3 Bills
3 Sectional Analyses

Enclosure 1

SUMMARY OF DOT DEREGULATION LEGISLATION

The *trucking* bill would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff publication requirements;
- eliminate the "common carrier obligation";
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on operations that previously were regulated by the ICC; but
- not change current statutory provisions requiring DOT to set financial responsibility requirements.

The *freight forwarder* bill is similar to the trucking proposal. It would remove ICC jurisdiction over freight forwarders and would eliminate their antitrust immunity. It would also remove express and sleeping car service (such service no longer exists) and transportation brokers (who compete with freight forwarders) from ICC jurisdiction, and eliminate the restriction against forwarders acquiring control over motor carriers.

The *domestic water carrier* bill would eliminate ICC jurisdiction over all water carriage (barges, Great Lakes, and intercoastal shiping (sic)). Because of extensive exemptions, the ICC currently regulates less than ten percent of water carriage.

Each bill would become effective July 1, 1986.

Enclosure 2

SUMMARY OF DOT TRUCKING DEREGULATION LEGISLATION

The *trucking* bill would eliminate all remaining ICC regulation of the truck industry. It would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- *not* change current statutory safety provisions and those requiring DOT to set financial responsibility requirements;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff filing and publication requirements;
- eliminate the "common carrier obligation";
- eliminate all ICC truck leasing rules;
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on trucking operations that previously were regulated by the ICC; and
- become effective July 1, 1986.

Comparison of Draft Motor Carrier Legislation With Current Statute

[Excerpt]

	Current Statute	Draft Motor Carrier Legislation
CHAPTER 107: RATES AND TARIFFS		
Antitrust Immunity	Immunity for joint-line rates, general rate increases, collective classification; single-line immunity was removed on July 1, 1984	Remove all immunity
Tariffs		
Requirements to Make Tariffs Available	ICC recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Requirement to File Tariffs With ICC	Icc recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Maximum/Minimum Rate Jurisdiction by ICC	Yes	Remove jurisdiction
Nondiscrimination Jurisdiction by ICC	Yes	Remove jurisdiction (would still be subject in part to antitrust statutes)
Zone of Ratemaking Freedom	Yes (but rarely used)	Remove

* * * *

Enclosure 8

A BILL

[Excerpt]

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Trucking Deregulation Act of 1985."

PURPOSE OF THE ACT

Sec. 2. This Act is a part of the continuing effort by Congress to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of motor carrier transportation in the United States. It is intended to further amend the Interstate Commerce Act, as amended through the Motor Carrier Safety Act of 1984.

CONGRESSIONAL FINDINGS

Sec. 3. (a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the present and future; that, historically, the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities, small businesses, and others to enter the trucking industry; that protective regulation has resulted in operating inefficiencies and anticompetitive pricing, has tended to suppress technological and managerial innovation, and has tended to restrict the range of price and service

options available to shippers; that available evidence suggests that significant competitive and consumer benefits have been associated with the partial deregulation of the Motor Carrier Act of 1980 and that the remaining regulations are unnecessary and impose costs on society; that commercial laws have general applicability and are more appropriate for meeting desirable goals than specific regulations; that adequate protection for shippers and consumers can be provided by shifting certain functions to other agencies or by applying the antitrust laws; that in order to reduce the uncertainty felt by the Nation's transportation industries, many of the Interstate Commerce Commission's remaining responsibilities for the regulation of motor carrier transportation should be legislatively, rather than administratively, reduced and the Commission should be given well-defined parameters within which it may exercise its remaining jurisdiction, subject to Congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption consistent with achieving the reforms enacted.

(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 3 years following the effective date of enactment of this Act, to ensure that this Act is being implemented according to Congressional intent and purpose.

GENERAL PROVISIONS

Sec. 4. Section 10101 of title 49, United States Code, is amended

(a) in subsection (a) (2) by inserting "of passengers" after "motor carrier";

(b) in subsection (a)(2)(A) by striking "shippers, receivers,";

(c) in subsection (a)(2)(B) by striking "shipping and";

(d) in subsection (a)(2)(E) by striking "and small shippers";

(e) in subsection (a)(2)(H) by striking "and" after the semicolon;

(f) by striking subsection (a)(2)(I) and the connector "and" at the end thereof;

(g) in subsection (a)(3)

(1) by striking "(3) in regulating transportation by motor carrier of passengers";

(2) by striking "(A) to" and inserting "(I)" in lieu thereof;

(3) by striking "(B) to" and inserting "(J)" in lieu thereof; and

(4) by striking "(C) to" and inserting "(K)" in lieu thereof.

Sec. 5. Section 10102 of title 49, United States Code, is amended—

(a) in paragraph (9)(C)

(1) by inserting "a motor carrier of property or" after "transportation"; and

(2) by striking ", II," after "subchapter I";

(b) in paragraph (11) by striking "and such other similar property as the Commission may provide by regulation" each time it appears; and

(c) in paragraph (12) by adding the following new sentences at the end thereof:

"'Motor carrier' is further defined as meaning a motor carrier of passengers and does not include a motor carrier of property unless otherwise specifically stated. This further definition is not applicable to the definition of motor carrier as used in other subtities or titles of the U.S. Code."

INTERSTATE COMMERCE COMMISSION ADMINISTRATION

Sec. 6. Section 10322 of title 49, United States Code, is amended—

(a) in subsection (a)

(1) by striking ", or section 10934" at the end of the first sentence;

(2) by striking "10530," in the second sentence;

(3) by striking "10922(i)(2), 10922(i)(4)" in the second sentence and inserting "10922(h)(2)" in lieu thereof;

(4) by striking "10934(c)," in the second sentence; and

(5) by striking "10922(c)(2)(A)" in the third sentence and inserting "10922(b)(2)(A)" in lieu thereof;

(b) in subsection (b)(1) by striking "Except as provided in paragraph (2) of this subsection, a" and inserting "A" in lieu thereof;

(c) by striking subsection (b)(2); and

(d) by redesignating subsection (b)(3) as subsection (b)(2).

JURISDICTION

Sec. 7. Section 10521 of title 49, United States Code, is amended—

inadequate to the task of ensuring compliance with rate bureau procedures. As this Court held in *ATA*, "Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of [rate bureau] guidelines." *Id.* at 2466-67. If the Government now believes that the panoply of shipper remedies available under the ICA, in light of *ATA*, is insufficient, it has recourse to Congress to urge the creation of treble damage sanctions for rate bureau violations.

* * *

In sum, *Keogh* is settled law, which for 60 years has ensured that both carriers and shippers could rely on the Interstate Commerce Act for the resolution of damage disputes implicating regulated rates. If there are to be policy-driven changes in that law, then those changes should be made by the political branches that have the governmental capacity to harmonize the interests and equities at stake.

Respectfully submitted,

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August 14, 1985

APPENDIX

APPENDIX

Communications To Congress By The Department of Justice, The Department of Transportation, and The Interstate Commerce Commission Regarding Recent Amendments To The Interstate Commerce Act

A. Railroad Revitalization and Regulatory Reform Act of 1976.

1. *Hearings on S. 793, S. 863, S. 1143, S. 1217, S. 1385, S. 1396, S. 1476, S. 1679, S. 1770, S. 1801, S. 1876, S. 1879, S. 1898, S. 1946, and S. 2027 Before the Comm. on Commerce, United States Senate*, 94th Cong., 1st Sess. 619, 658, 689, 692, 701 (1975).

2. *Railroad Accounting, Materials Availability, and Transportation Statistics, Hearings on H.R. 7778 and Section 8 of H.R. 7681 Before the Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 94th Cong., 1st Sess. 13, 69 (1975).

3. H.R. Rep. No. 725, 94th Cong., 1st Sess. 224, 279 (1975).

4. S. Rep. No. 499, 94th Cong., 1st Sess. 314 (1975).

B. Motor Carrier Act of 1980.

1. *Regulation of Carriers Subject to the Interstate Commerce Act, Hearings on H.R. 10909, H.R. 12084, H.R. 12793, H.R. 11664, H.R. 12386, H.R. 15438, H.R. 15439, H.R. 15440, H.R. 15442, H.R. 15443, H.R. 15444, H.R. 980, H.R. 986, H.R. 10473, H.R. 12491, H.R. 15271, H.R. 13353, H.R. 7503, H.R. 1080; and S. 3308 Before the Subcomm. on Surface Transportation of the Comm.*

on Public Works and Transportation, House of Representatives, 94th Cong., 2d Sess. 99, 126, 151, 236 (1976).

2. *Regulatory Problems of the Independent Owner-Operator in the Nation's Trucking Industry (Part 3), Hearings Before the Subcomm. on Special Small Business Problems of the Comm. on Small Business, House of Representatives*, 95th Cong., 1st Sess. 161 (1977).

3. *Oversight of Freight Rate Competition in the Motor Carrier Industry, Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, United States Senate*, 95th Cong., 1st and 2d Sess., Volume 1, at 4, 46 (1978).

4. *Oversight of Freight Rate Competition in the Motor Carrier Industry, Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, United States Senate*, 95th Cong., 2d Sess., Volume 2, at 836 (1978).

5. *Economic Regulation of the Trucking Industry, Hearing Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 1, at 30 (1979).

6. *Economic Regulation of the Trucking Industry, Hearings on S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 2, at 428, 585, 627 (1979).

7. *Truck Safety Act, Hearings on S. 1390 and S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess. 70, 100, 116, 118 (1979).

8. *Economic Regulation of the Trucking Industry, Hearings on S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 3, at 826, 844, 863, 1003 (1979).

9. *Economic Regulation of the Trucking Industry, Hearings on S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 4, at 1264, 1323, 1335, 1336, 1349 (1979).

10. *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of its Regulations, Part 3, Hearings on H.R. 6418 Before the Subcomm. on Surface Transportation of the Comm. on Public Works and Transportation, House of Representatives*, 96th Cong., 2d Sess. 191, 935, 1117 (1980).

11. *Economic Regulation of the Trucking Industry, Hearings on S. 2245 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 2d Sess., Part 5, at 1499, 1578, 1611, 1876, 1927 (1980).

12. *Customer Pickup Proposals and Their Impact on Small Business and the Robinson-Patman Act, Hearings Before the Select Comm. on Small Business, United States Senate*, 96th Cong., 2d Sess. 208 (1980).

C. Household Goods Transportation Act of 1979.

1. *Hearings on S. 1798 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess. 4, 316, 412 (1979).

D. Staggers Rail Act of 1980.

1. *Implementation of the 4R Act, Hearings Before the Subcomm. on Surface Transportation of the*

Comm. on Commerce, Science, and Transportation, United States Senate, 96th Cong., 1st Sess. 4, 10, 45, 69 (1979).

2. 125 Cong. Rec. 6436 (1979).

3. 126 Cong. Rec. 17787, 24032, 24329, 24824, 24839, 27899 (1980).

4. *Coal Rates and Federal Railroad Regulation: Oversight of the Railroad Revitalization and Regulatory Reform Act of 1976, Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. 74, 102, 126, 468, 524, 763, 788, 799 (1979).

5. *Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. 87, 135, 420, 359, 929, 959, 1014 (1979).

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(5)

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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY OF PETITIONERS TO RESPONDENTS' JOINT BRIEF IN OPPOSITION AND RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
1. The ICC Supports The Petition For Certiorari And Itself Has Noted Budgetary Constraints Which Limit Its Ability To Review Tariff Filings	2
2. Congress Has Not Endorsed The *Keogh* Doctrine	4
3. *Stare Decisis* Is Inapplicable Where the Underlying Decision Has Not Been Reviewed In Light Of Statutory Changes And Later Decisions Of The Court Which Reject The Prior Rationale	4
4. *Stare Decisis* Does Not Apply To Situations Not Encompassed Within The Prior Decision	5
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES:	Page
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	4
Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945)	5
ICC v. American Trucking Associations, Inc., 104 S. Ct. 2458 (1984)	2, 3
Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922)	2
United States v. Mitchell, 271 U.S. 9 (1926)	5
STATUTES:	
The Reed-Bulwinkle Act, 62 Stat. 472 (1948)	4

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY OF PETITIONERS TO RESPONDENTS' JOINT BRIEF IN OPPOSITION AND RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO UNITED STATES AS AMICUS CURIAE

In Respondents' Joint Brief in Opposition and their Supplemental Brief in Reply to the United States as *Amicus Curiae*, the respondent motor carriers contend that the Interstate Commerce Commission possesses adequate remedies over unauthorized and illegal rate making and that Congress has recognized and *sub silentio* endorsed the exclusiveness of ICC-generated relief to aggrieved ship-

pers. The respondents also contend that principles of *stare decisis* should require this Court to avoid review of the *Keogh* doctrine notwithstanding the Second Circuit's conclusion that *none* of the reasons enunciated by the Court in support of the result in *Keogh* are valid today. The respondents' contentions are erroneous.[1]

ARGUMENT

1. The ICC Supports The Petition For Certiorari And Itself Has Noted Budgetary Constraints Which Limit Its Ability To Review Tariff Filings

It should be noted that the Brief as *Amicus Curiae* of the United States was signed not only by the Solicitor General,

[1]The respondents' Supplemental Reply to the United States also mischaracterizes the prior position of the government with respect to *Keogh*'s current validity. On page 5 of their Supplemental Brief, respondents state:

> Just last year, in *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984), the United States argued to this Court precisely the opposite—that because of *Keogh* and its restriction on treble damages recovery, the ICC required broad power to nullify rates retroactively, and to award shippers damages under the Interstate Commerce Act for rate bureau violations.

The government, however, did *not* argue that *Keogh* should or does restrict treble damage recovery. In fact, what the government said was:

> Amici also argue that antitrust liability (see Amici a. 13, n.23) is a 'powerful' and adequate deterrent. But it is doubtful that many shippers can undertake an antitrust action given the costs and risks of such litigation. See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). More important, the *Commission* has no power to bring claims against carriers for violations of the antitrust laws.

Reply Brief for the United States at pp. 4-5. To the best knowledge of petitioners, at no time since passage of the Reed-Bulwinkle Act in 1948 has the government taken the position that antitrust damage recovery by shippers is prevented under *Keogh* when motor carriers are in direct violation of their rate bureau agreement or deliberately choose to conspire outside of the terms of the rate bureau agreement.

but by the ICC and the Department of Transportation as well. It is incongruous for the respondent motor carriers, charged with knowingly violating their rate bureau agreement, to assert that the ICC has adequate resources and authority to scrutinize conspiratorial rate filings when the ICC itself is supporting review of the *Keogh* decision.

In *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984), in which the present respondent, Niagara Frontier Tariff Bureau, also was a co-respondent, the Brief of the ICC detailed to this Court the inability of the Commission to pre-examine tariff filings even for obvious errors. The Commission stated:

> As a practical matter, therefore, unless a defect [in a tariff filing] is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

Petitioners' Brief at 3.[2]

Budgetary constraints preclude the Commission from investigating more than a *de minimus* number of tariff filings. The ICC obviously is unable to review hundreds of point-to-point tariff filings included within long-term conspiracies such as the one alleged in this action. The *Keogh* doctrine is being used to shield retention of substantial revenues collected under a deliberate collusive scheme to avoid compliance with a rate bureau agreement. When the Court—not Congress—promulgated *Keogh*, it was not intending to afford wrongdoers an opportunity to profit by circumventing ICC regulation. Today's distorted use of *Keogh* to achieve a result contrary to the public interest is

[2]For the convenience of the Court, the applicable portion of the Statement of the Case set forth in the Brief of the ICC in the *ATA* case is reprinted as Appendix A to this reply.

yet another strong reason favoring review of *Keogh* by this Court.

2. Congress Has Not Endorsed The Keogh Doctrine

The *Keogh* doctrine was a judicial accommodation between apparently contradictory statutory directives and never has been endorsed by Congress. The issue of when and under what circumstances antitrust immunity would be extended to rate bureaus and their members was addressed in the Reed-Bulwinkle Act. Pub. L. No. 80-662, 62 Stat. 472 (1948). The language of the Act unequivocally conditions exemption from the antitrust laws on compliance with the Interstate Commerce Act and with rate bureau agreements approved by the ICC. It would be self-defeating to the regulatory plan set forth in Reed-Bulwinkle to extend immunity to surreptitious conspiracies to circumvent rate bureau agreements. Thus, denial of *Keogh* immunity to carriers which choose to operate outside of the immunity extended by Reed-Bulwinkle could not conflict with any Congressional goal.

3. *Stare Decisis* Is Inapplicable Where The Underlying Decision Has Not Been Reviewed In Light of Statutory Changes And Later Decisions Of The Court Which Reject The Prior Rationale

It would not be appropriate to apply principles of *stare decisis* to prevent, for all practical purposes, shippers from any recovery of deliberately-imposed illegal overcharges. This is especially so when, as recognized by the court of appeals, the original rational for *Keogh* has been discarded. Review is all the more appropriate in light of the *Keogh* decision's plain inconsistency with *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213 (1966), as well as the recognition by all nine justices in *ICC v. ATA* that shippers

may recover damages under the antitrust laws.[3] Moreover, the passage of the Reed-Bulwinkle Act in 1948 expressly conditioned immunity under the antitrust laws to compliance with the regulatory plan of the Act and thus limited *Keogh*'s applicability.[4]

4. *Stare Decisis* Does Not Apply To Situations Not Encompassed Within the Prior Decision

Principles of *stare decisis* can hardly apply to issues which were not presented or decided in a prior decision. *United States v. Mitchell*, 271 U.S. 9 (1926). The Court's *Keogh* decision concerned nothing more than an attempt to resolve differences between the language of the Interstate Commerce Act which permitted the ICC to approve jointly proposed rates and the Sherman Act prohibition against collective price fixing. Nothing in the *Keogh* fact situation dealt with coercive suppression of independent rates. Neither did *Keogh* involve rates which, while filed with the ICC, were formulated in knowing and secret defiance of ICC regulations.

---

[3]Under respondents' reading of *Keogh*, the recovery of antitrust damages related to illegal rate filings or suppressed rate filings is forbidden in all circumstances. It is impossible to square that position with the entire Court's recognition in *ATA* that shippers may recover damages under the antitrust laws.

[4]The case of *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), on which respondents seek to rely, was decided prior to the passage of the Reed-Bulwinkle Act.

Accordingly, the petition for a writ of certiorari should be granted.

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Dated: August 29, 1985

APPENDIX

APPENDIX A

FROM BRIEF FOR THE PETITIONERS IN INTERSTATE COMMERCE COMMISSION V. AMERICAN TRUCKING ASSOCIATIONS, INC., NO. 82-1643, OCT. TERM 1983

Statement

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. V) 1 *et seq.*,[1] carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[2] During the waiting period, the Commission entertains any protests against the rate and decides whether to reject it, suspend its effectiveness, investigate it, or permit it to become effective without investigation. See 49 U.S.C. 10762(e), 10707, 10708. Once a tariff is in effect, carriers must charge and shippers must pay the rates named in the tariff. 49 U.S.C. 10761.

Until 1979, the Commission examined every filing for obvious defects prior to the tariff's effective date. Tariffs containing serious errors were rejected, and the carrier was required to refile an acceptable tariff. When an insubstantial error was discovered, the Commission either required prompt correction, or advised the carrier of the error and requested that it take more care in the future. Because this preexamination procedure minimized the

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[1]Hereafter, references to 49 U.S.C. will be to the current statute, printed in Supp. V, unless otherwise indicated.

[2]The waiting period for railroad rates is 20 days (10 days for reductions). 49 U.S.C. 10762(c)(3). Motor carrier rates become effective after 30 days. 49 U.S.C. 10762(a)(2). The Commission has the power to shorten the waiting period. 49 U.S.C. 10762(d)(1).

possibility that a tariff containing errors would become effective, the Commission generally imposed no penalty on those rare occasions when an error was discovered after a tariff had gone into effect.

When budget reductions forced the Commission to reallocate its scarce resources, the Commission determined that it could no longer maintain sufficient tariff examiners to preexamine every filing. Accordingly, in October 1979, the Commission began reviewing only a random sample of tariff filings.[3] As a practical matter, therefore, unless a defect is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

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[3]Currently, the Commission examines only the title pages of tariff filings.

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No. 85-21

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS INFORMING THE COURT OF A RECENT LEGISLATIVE PROPOSAL

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September 23, 1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY and
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v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS INFORMING THE COURT OF A RECENT LEGISLATIVE PROPOSAL

This petition presents the issue whether the Court should reconsider the statutory issue previously settled in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). In response to the brief of the United States as amicus curiae in support of the petition, Respondents noted that, if the executive branch desires changes in the regulatory structure of which the *Keogh* doctrine is a part, it remains free to seek them from the legislature. Supplemental Brief Of Respondents In Reply To The United States As Amicus Curiae at 4-5 & n.8.

Since that Supplemental Brief was filed, Amicus, through the Department of Transportation, has in fact proposed legislation that would repeal all ICC regulation of the rates and tariffs of motor carriers of property such as the Respondents. *See* DOT Legislative Package of Sept. 12, 1985 (Appendix). More specifically, the

legislation would, if enacted, "eliminate all remaining ICC regulation of trucking rates . . . ," "eliminate tariff publication requirements," and "eliminate antitrust immunity for collective ratemaking." *Id.* In short, Amicus has proposed repeal of the regulatory underpinnings of the *Keogh* doctrine, and has done so in the proper forum: the Congress.

Respectfully submitted,

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September 23, 1985

APPENDIX

APPENDIX

U.S. DEPARTMENT OF
TRANSPORTATION

News:

Office of the Assistant Secretary
for Public Affairs
Washington, D.C. 20590

FOR IMMEDIATE RELEASE
Thursday, September 12, 1985

DOT 87-85
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DOT SECRETARY DOLE PROPOSES
TOTAL ECONOMIC DEREGULATION
OF INTERSTATE TRUCKING INDUSTRY

Secretary of Transportation Elizabeth Hanford Dole today sent to Congress legislation she said "will complete the job of economically deregulating the interstate trucking industry.

"The regulatory reforms already enacted have been a good first step, resulting in increased competition, more efficient distribution of goods, and simplified rate structures," the Secretary said. "Now is the time to take the final steps in removing outdated and unneeded restrictions."

The proposed legislation does not affect federal truck safety standards, which are set and enforced by the Department of Transportation's Bureau of Motor Carrier Safety and National Highway Traffic Safety Admin-

istration. Nor would the legislation change current statutory provisions requiring DOT to set financial responsibility requirements, such as insurance.

Consumers and shippers both will further benefit from removal of the last economic restrictions on trucking, Dole said, because "motor carriers will be permitted to carry whatever commodities they choose, over whatever routes they choose, at whatever rates are mutually agreeable to them and to their customers." She added that numerous studies show that the overwhelming majority of even the most rural shippers are receiving trucking service at least as good as it was before reforms began.

Under the proposed trucking legislation, consumer protection in household goods carriers' operations would be transferred from the ICC to the Federal Trade Commission.

The legislation would also:

* Eliminate all remaining ICC regulation of trucking rates and carrier entry into the business.
* Eliminate antitrust immunity for collective ratemaking.
* Eliminate the "common carrier" obligation.
* Prevent states from imposing new regulations on operations that previously were regulated by the ICC.
* Eliminate all ICC truck leasing rules.
* Eliminate tariff publication requirements.

Initial partial deregulation of the trucking industry has been in place for five years. President Reagan called for further motor carrier deregulation in his State of the Union message last January.

At the same time she sent the trucking legislation to Congress, the Secretary forwarded legislation proposing

to eliminate all Interstate Commerce Commission regulation of the surface freight forwarder industry and on domestic water carriers.

The freight forwarder bill is similar to the trucking proposal. It would remove ICC jurisdiction and would eliminate antitrust immunity for the freight forwarders.

The water carrier legislation proposes to eliminate all ICC jurisdiction over domestic water carriers—barges, intercoastal and Great Lakes carriers. Because of exemptions in these areas, the ICC currently regulates less than ten percent of water carriage.

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

Sep. 12, 1985

The Honorable George Bush
President of the Senate
Washington, D.C. 20510

IDENTICAL LETTER TO:
The Honorable Thomas
P. O'Neill, Jr.
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. President:

Economic regulation of the transportation industries began some ninety-eight years ago. While this regulation may have served the national interest well for a long time, much of it has now become an expensive paper chase with no offsetting benefits to consumers. It is now time to eliminate those elements of economic regulation which no longer provide any benefits to shippers or consumers. To accomplish this purpose I am transmitting three bills:

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes";

"To amend subtitle IV of title 49, United States Code, to reduce regulation of surface freight forwarders and brokers, and for other purposes"; and

"To amend subtitle IV of title 49, United States Code, to reduce regulation of interstate water carriers, and for other purposes."

These bills, entitled, respectively, the Trucking Deregulation Act of 1985, the Surface Freight Forwarder Deregulation Act of 1985, and the Interstate Water Carrier Deregulation Act of 1985, eliminate Interstate Commerce Commission regulation of those industries. The three bills are designed to build on the regulatory reforms effected in recent years through administrative changes made by the Interstate Commerce Commission (ICC), and through the legislative reforms provided by the Motor Carrier Act of 1980 and the Household Goods Transportation Act of 1980.

In the case of *motor carriers of property*, these reforms have worked extremely well. They have removed a considerable regulatory burden on the trucking industry, permitting carriers to increase the efficiency of their operations and to respond more rapidly and effectively to changing market conditions. These companies now compete relatively freely with each other because of liberal entry and operating restriction removal procedures. There is a more competitive environment, with more service and rate options for shippers, in many cases even for small shipments. The great majority of shippers believe the reforms have been advantageous to them. In sharp contrast to the arguments of opponents of reform that service to small communities would suffer, numerous studies show that the overwhelming majority of rural

small town shippers are getting service at least as good as before the reforms.

These reforms comprised a good first step in the right direction. It is now time to take the necessary final steps to complete deregulation of the trucking industry.

The bill builds on the evidence and recommendations of the Motor Carrier Ratemaking Study Commission, by eliminating the antitrust immunity now enjoyed by the trucking industry. The evidence compiled shows clearly that such immunity has raised rates unnecessarily and has not prevented undue discrimination.

The entry and rate regulation of the trucking industry that currently remains is unneeded and undesirable because there is ample competition within the trucking industry as well as competition from other modes. Such regulation suppresses managerial initiative and innovation, and wastes valuable taxpayer dollars and resources that the trucking industry could employ more usefully in improving its productivity.

Freight forwarders and *brokers* are intermediaries who arrange transportation for others. There is no justification for the continued regulation of either brokers or freight forwarders, as there is ample competition not only among and between them, but also competition from trucking companies and unregulated shipper associations.

Interstate water carriers have nominally been regulated by the Interstate Commerce Commission since the Transportation Act of 1940. However, as a result of numerous exemptions, ICC water carrier regulation applies to less than ten percent of interstate water transportation. The ICC-regulated intercoastal, inland waterways and Great Lakes transportation markets have no public utility basis for regulation, as numerous water carrier competitors exist, entry is easy, and investment requirements are relatively modest. Thus, the continued regulation of domestic water carriers is unneeded.

The Office of Management and Budget has advised that enactment of this proposed legislation would be in accord with the President's Program.

Sincerely,

/s/ Elizabeth
ELIZABETH HANFORD DOLE

13 Enclosures

4 Summaries
3 Charts
3 Bills
3 Sectional Analyses

Enclosure 1

SUMMARY OF DOT DEREGULATION LEGISLATION

The *trucking* bill would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff publication requirements;
- eliminate the "common carrier obligation";
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on operations that previously were regulated by the ICC; but
- not change current statutory provisions requiring DOT to set financial responsibility requirements.

The *freight forwarder* bill is similar to the trucking proposal. It would remove ICC jurisdiction over freight forwarders and would eliminate their antitrust immunity. It would also remove express and sleeping car service (such service no longer exists) and transportation brokers (who compete with freight forwarders) from ICC jurisdiction, and eliminate the restriction against forwarders acquiring control over motor carriers.

The *domestic water carrier* bill would eliminate ICC jurisdiction over all water carriage (barges, Great Lakes, and intercoastal shiping (sic)). Because of extensive exemptions, the ICC currently regulates less than ten percent of water carriage.

Each bill would become effective July 1, 1986.

Enclosure 2

SUMMARY OF DOT TRUCKING DEREGULATION LEGISLATION

The *trucking* bill would eliminate all remaining ICC regulation of the truck industry. It would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- *not* change current statutory safety provisions and those requiring DOT to set financial responsibility requirements;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff filing and publication requirements;
- eliminate the "common carrier obligation";
- eliminate all ICC truck leasing rules;
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on trucking operations that previously were regulated by the ICC; and
- become effective July 1, 1986.

Comparison of Draft Motor Carrier Legislation With Current Statute

[Excerpt]

	Current Statute	Draft Motor Carrier Legislation
CHAPTER 107: RATES AND TARIFFS		
Antitrust Immunity	Immunity for joint-line rates, general rate increases, collective classification; single-line immunity was removed on July 1, 1984	Remove all immunity
Tariffs		
Requirements to Make Tariffs Available	ICC recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Requirement to File Tariffs With ICC	Icc recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Maximum/Minimum Rate Jurisdiction by ICC	Yes	Remove jurisdiction
Nondiscrimination Jurisdiction by ICC	Yes	Remove jurisdiction (would still be subject in part to antitrust statutes)
Zone of Ratemaking Freedom	Yes (but rarely used)	Remove

* * * *

Enclosure 8

A BILL

[Excerpt]

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Trucking Deregulation Act of 1985."

PURPOSE OF THE ACT

Sec. 2. This Act is a part of the continuing effort by Congress to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of motor carrier transportation in the United States. It is intended to further amend the Interstate Commerce Act, as amended through the Motor Carrier Safety Act of 1984.

CONGRESSIONAL FINDINGS

Sec. 3. (a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the present and future; that, historically, the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities, small businesses, and others to enter the trucking industry; that protective regulation has resulted in operating inefficiencies and anticompetitive pricing, has tended to suppress technological and managerial innovation, and has tended to restrict the range of price and service

options available to shippers; that available evidence suggests that significant competitive and consumer benefits have been associated with the partial deregulation of the Motor Carrier Act of 1980 and that the remaining regulations are unnecessary and impose costs on society; that commercial laws have general applicability and are more appropriate for meeting desirable goals than specific regulations; that adequate protection for shippers and consumers can be provided by shifting certain functions to other agencies or by applying the antitrust laws; that in order to reduce the uncertainty felt by the Nation's transportation industries, many of the Interstate Commerce Commission's remaining responsibilities for the regulation of motor carrier transportation should be legislatively, rather than administratively, reduced and the Commission should be given well-defined parameters within which it may exercise its remaining jurisdiction, subject to Congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption consistent with achieving the reforms enacted.

(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 3 years following the effective date of enactment of this Act, to ensure that this Act is being implemented according to Congressional intent and purpose.

GENERAL PROVISIONS

Sec. 4. Section 10101 of title 49, United States Code, is amended

(a) in subsection (a)(2) by inserting "of passengers" after "motor carrier";

(b) in subsection (a)(2)(A) by striking "shippers, receivers,";

(c) in subsection (a)(2)(B) by striking "shipping and";

(d) in subsection (a)(2)(E) by striking "and small shippers";

(e) in subsection (a)(2)(H) by striking "and" after the semicolon;

(f) by striking subsection (a)(2)(I) and the connector "and" at the end thereof;

(g) in subsection (a)(3)

(1) by striking "(3) in regulating transportation by motor carrier of passengers";

(2) by striking "(A) to" and inserting "(I)" in lieu thereof;

(3) by striking "(B) to" and inserting "(J)" in lieu thereof; and

(4) by striking "(C) to" and inserting "(K)" in lieu thereof.

Sec. 5. Section 10102 of title 49, United States Code, is amended—

(a) in paragraph (9)(C)

(1) by inserting "a motor carrier of property or" after "transportation"; and

(2) by striking ", II," after "subchapter I";

(b) in paragraph (11) by striking "and such other similar property as the Commission may provide by regulation" each time it appears; and

(c) in paragraph (12) by adding the following new sentences at the end thereof:

"'Motor carrier' is further defined as meaning a motor carrier of passengers and does not include a motor carrier of property unless otherwise specifically stated. This further definition is not applicable to the definition of motor carrier as used in other subtitles or titles of the U.S. Code."

INTERSTATE COMMERCE COMMISSION ADMINISTRATION

Sec. 6. Section 10322 of title 49, United States Code, is amended—

(a) in subsection (a)

(1) by striking ", or section 10934" at the end of the first sentence;

(2) by striking "10530," in the second sentence;

(3) by striking "10922(i)(2), 10922(i)(4)" in the second sentence and inserting "10922(h)(2)" in lieu thereof;

(4) by striking "10934(c)," in the second sentence; and

(5) by striking "10922(c)(2)(A)" in the third sentence and inserting "10922(b)(2)(A)" in lieu thereof;

(b) in subsection (b)(1) by striking "Except as provided in paragraph (2) of this subsection, a" and inserting "A" in lieu thereof;

(c) by striking subsection (b)(2); and

(d) by redesignating subsection (b)(3) as subsection (b)(2).

JURISDICTION

Sec. 7. Section 10521 of title 49, United States Code, is amended—

(a) by adding the following new sentence at the beginning of subsection (a):

"Notwithstanding any other provision of law, the Interstate Commerce Commission has no jurisdiction over motor carriers of property except as provided in subsection (c)."; and

(b) by adding "of passengers" after "over transportation" in subsection (a);

(c) in subsection (b) by striking "10922(c)(2)" each time it appears and inserting "10922(b)(2)" in lieu thereof; and

(d) by adding at the end thereof the following new subsection:

"(c) The Commission shall retain jurisdiction over a motor common carrier providing transportation of household goods for the purposes of sections 10934, 11341, and 11342 until three years after the effective date of this act."

* * * *

RATES, TARIFFS, AND VALUATIONS

Sec. 22. Section 10705 of title 49, United States Code, is amended—

(a) in subsection (a)(1) by striking "(except a motor common carrier of property)";

(b) by striking subsections (b)(1) and (b)(2);

(c) by redesignating subsections (c) through (g) as subsections (b) through (f);

(d) in subsection (b) as redesignated, by striking the comma after "rail carrier" and inserting "or" in lieu thereof and by striking ", or motor common carrier of property" in the second sentence;

(e) in subsection (e) as redesignated by subsection (c) of this section by striking "or (b)";

(f) in subsection (f) as redesignated by subsection (c) of this section by striking "(f)" after "subsection" and inserting "(e)" in lieu thereof; and

(g) by striking subsection (h).

Sec. 23. Section 10706 of title 49, United States Code, is amended—

(a) in subsection (a)(2)(A) by striking "(c)(1)(B)-(E)" and inserting "(d)(1)(B)-(E)" in lieu thereof;

(b) by striking subsection (b)(3)(D) and by redesignating subsections (b)(3)(E) through (b)(3)(H) as subsections (b)(3)(D) through (b)(3)(G); and

(c) by striking subsection (b)(4) and by redesignating subsection (b)(5) as subsection (b)(4).

Sec. 24. Section 10708 of title 49, United States Code, is amended—

(a) in subsection (d)(1) by striking "motor common carrier of property or";

(b) in subsections (d)(1)(A) and (d)(1)(B) by striking "carrier" each time it appears and inserting "freight forwarder" in lieu thereof;

(c) in subsection (d)(2) by striking "motor common carriers of property or"; and

(d) in subsection (d)(2)(B)(i) by striking "carriers or".

* * * *

Sec. 36. Section 10762 of title 49, United States Code, is amended—

(a) in subsection (a)(1) by striking the last sentence; and

(b) by striking subsection (g).

Sec. 37. Section 10766 of title 49, United States Code, is amended in subsection (b) by striking ", providing transportation subject to the jurisdiction of the Commission under subchapter II of that chapter,".

Sec. 38. The analysis of chapter 107 of title 49, United States Code, is amended—

(a) by striking

"10732. Food and grocery transportation." and inserting in lieu thereof

"10732. Backhaul allowances.";

(b) by striking

"10733. Rates for transportation of recyclable materials." and inserting in lieu thereof

"10733. Repealed."; and

(c) by striking

"10735. Household goods rates—estimates; guarantees of services.";

and inserting in lieu thereof

"10735. Repealed.".

* * * *

Enclosure 9

Section by Section Analysis of the Trucking Deregulation Act of 1985

[Excerpt]

This bill eliminates all federal economic regulation of the trucking industry; it eliminates entry controls and rate regulation; eliminates antitrust immunity for collective ratemaking; eliminates tariff publication requirements; eliminates the "common carrier obligation"; and transfers jurisdiction for consumer protection in household goods operations to the Federal Trade Commission.

There is vigorous competition not only within the for-hire motor carrier industry, but also from other elements of the transportation sector, such as private trucking, freight forwarders, and railroads, and potential competition from independent owner-operators, as well. Hence, there is no need for continued regulation of the trucking industry.

Section 1

The short title of the bill is the "Trucking Deregulation Act of 1985."

Section 2

The purpose of the bill is to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of transportation by motor carriers of property in the United States.

Section 3

This section states the findings of Congress. It sets out that the statutes governing Federal regulation of motor carriers of property are outdated and must be revised to reflect transportation needs and realities of the present and future; and that government regulation has resulted in operating inefficiencies and anticompetitive pricing and should be reduced.

Section 4

This section amends the transportation policy of the Interstate Commerce Act to reflect the elimination of economic regulation of motor carriers of property.

Section 5

This section amends section 10102(12) of title 49 USC by further defining motor carrier as used in subtitle IV of title 49 as only meaning a motor carrier of passengers. It clarifies that the intent of this Act is to remove Interstate Commerce Commission regulation of motor carriers of property.

Section 6

This section deletes the procedural guidelines of section 10322 of title 49 USC for handling applications involving motor carrier transportation incidental to trailer on flatcar or container on flatcar service by rail or registration certificates for foreign motor carriers. This is a conforming change, since this legislation eliminates the necessity for applying to the Interstate Commerce Commission for any kind of motor carrier authority.

Section 7

This section amends section 10521 of title 49 USC to remove Interstate Commerce Commission jurisdiction over motor carriers of property, with one limited exception regarding household goods carriers. This exception allows the Interstate Commerce Commission to maintain jurisdiction over motor carrier transportation of household goods for three years after the effective date of the Act, for the limited purposes of retaining special antitrust immunity for household goods van lines (so that they can continue to engage in certain business relationships with their own local agents) and of retaining the Interstate Commerce Commission's power to approve or disapprove pooling agreements between a van line and its

agents. This jurisdiction over household goods carriers is retained for three years in order to minimize possible disruption resulting from the eventual removal of all special antitrust immunity for household goods van line-agent relationships. The delayed effective date of removal of immunity will give van lines and their agents additional time to develop corporate business structures and relationships that do not require special antitrust immunity.

* * * *

Section 22

This section amends section 10705 of title 49 USC by removing the authority of the Interstate Commerce Commission over motor common carriers of property to prescribe through routes, joint classifications, joint rates, the division of rates, and the conditions under which those routes must be operated.

Section 23

This section amends section 10706 of title 49 USC by removing Interstate Commerce Commission jurisdiction for providing antitrust immunity to motor carriers of property. Under the provisions of section 83 of this legislation, elimination of antitrust immunity will occur on July 1, 1986. This section does not disturb antitrust immunity for motor carriers of passengers or other carriers.

Section 24

This section amends section 10708 of title 49 USC to remove Interstate Commerce Commission jurisdiction to investigate, suspend, revise, or revoke any rate of a motor common carrier of property on the grounds that such rate is unreasonably high or low. The "zone of rate freedom" provided by the Motor Carrier Act of 1980 would remain applicable only to freight forwarders.

* * * *

Section 36

This section amends section 10762 of title 49 USC by removing the requirement for motor carriers of property to publish, file, and keep tariffs open for public inspection.

Section 37

This section amends section 10766 by deleting the requirement that freight forwarders may only contract with Interstate Commerce Commission regulated motor carriers of property.

Section 38

This section makes changes in the analysis of Chapter 107 of title 49 to conform to the changes made in sections 19 through 37.

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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PETITIONERS' RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

On September 23, 1985, the respondent motor freight tariff bureau and its individual trucking company member respondents informed the Court that the Department of Transportation had proposed legislation which, if enacted without change, would deregulate further the Interstate Commerce Commission's supervision of motor carrier tariffs. On September 27, 1985 the American Trucking Association (ATA), through its chief executive officer, appeared before the Committee on Commerce, Science and Transportation of the

United States Senate and opposed passage of this legislation.*

ATA describes itself as "the national trade association of the trucking industry. Through its 51 affiliated trucking associations located in every state and the District of Columbia, 11 affiliated conferences, and several thousand individual motor carriers, ATA represents every type and class of motor carrier in the country." (App. p. 2) The ATA testimony informed the Congress:

> We believe that elimination of antitrust immunity for collective ratemaking and all powers of the Interstate Commerce Commission (ICC) to establish reasonable parameters on motor carrier services would have the following effects:

The testimony thereafter listed eleven ostensibly adverse effects on the trucking industry which would occur if the legislative proposal passed or passed without amendment. A copy of the relevant pages of the ATA opposition Statement on Deregulation Legislation is appended for the convenience of the Court.

---

* The Teamsters Union (International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America) joined the ATA in opposing the bill.

Respectfully submitted,

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**Counsel of Record*

Dated: October 2, 1985

APPENDIX

APPENDIX

Before the

UNITED STATES SENATE
COMMITTEE ON COMMERCE,
SCIENCE AND TRANSPORTATION

September 27, 1985
Washington, DC

Statement of the

AMERICAN TRUCKING ASSOCIATIONS

On

DEREGULATION LEGISLATION

Thomas J. Donohue
President and Chief Executive Officer

I. INTRODUCTION

I am Thomas J. Donohue, President and Chief Executive Officer of the American Trucking Associations, Inc. I submit this statement on behalf of ATA.

ATA is the national trade association of the trucking industry. Through its 51 affiliated trucking associations located in every state and the District of Columbia, 11 affiliated conferences, and several thousand individual motor carriers, ATA represents every type and class

of motor carrier in the country: for-hire and private; regulated and exempt.

As stated in our oversight testimony three weeks ago, ATA vigorously opposes any legislation that would further deregulate the trucking industry at this time. ATA's opposition is not based on philosophical or ideological grounds. We oppose further deregulation for pragmatic reasons based on the difficult financial position of our industry and the potential negative impact on safety that additional deregulation would have.

• • • • • • • • • •

II. THE IMPACT OF FURTHER PROCEEDINGS

No one has a crystal ball to help predict the future. Had there been one, it might have been wise to delay passage of the 1980 Motor Carrier Act until after the 1982 recession. The recession was a major blow to the motor carrier industry. Other unanticipated developments that have occurred since 1980 are documented in the previous section. These problems are real and should be resolved before Congress enacts further economic deregulaton of the trucking industry.

We attempt in this section to project the effects of further economic deregulation as proposed by the Department of Transportation. We believe that elimination of antitrust immunity for collective ratemaking and all powers of the Interstate Commerce Commission (ICC) to establish reasonable parameters on motor carrier rates and services would have the following effects:

(1) Stimulate massive price wars;

(2) Increase ratemaking costs;

(3) Shrink working capital;

(4) Accelerate concentration in the less-than-truckload (LTL) general freight segment of the industry;

(5) Expand overcapacity in the truckload segment of the industry;

(6) Exacerbate the insurance crisis;

(7) Aggravate the tax burden;

(8) Force a renegotiation of the National Master Freight Agreement;

(9) Worsen the industry's multiemployer pension plan problem;

(10) Expand non-reciprocal operations by foreign carriers in the U.S.; and

(11) Eliminate the collection of essential motor carrier industry data.

Following are brief descriptions of each impact.

(1) Stimulate Massive Price Wars

Over the past five years, the trucking industry has experienced greater competitive pricing activitiy than ever before. The Motor Carrier Act of 1980 was designed to accomplish that purpose, particularly with provisions establishing an expanding zone of pricing flexibility free from the statutorily-imposed rate regulation by the ICC.

Motor carriers have not found it necessary to utilize the free zone since the ICC's change in attitude toward its rate responsibilities. Motor carriers have filed vigorously competitive rates and, daily, thousands of discounts are made independently from collectively-filed

(a) by adding the following new sentence at the beginning of subsection (a):

"Notwithstanding any other provision of law, the Interstate Commerce Commission has no jurisdiction over motor carriers of property except as provided in subsection (c)."; and

(b) by adding "of passengers" after "over transportation" in subsection (a);

(c) in subsection (b) by striking "10922(c)(2)" each time it appears and inserting "10922(b)(2)" in lieu thereof; and

(d) by adding at the end thereof the following new subsection:

"(c) The Commission shall retain jurisdiction over a motor common carrier providing transportation of household goods for the purposes of sections 10934, 11341, and 11342 until three years after the effective date of this act."

* * * *

RATES, TARIFFS, AND VALUATIONS

Sec. 22. Section 10705 of title 49, United States Code, is amended—

(a) in subsection (a)(1) by striking "(except a motor common carrier of property)";

(b) by striking subsections (b)(1) and (b)(2);

(c) by redesignating subsections (c) through (g) as subsections (b) through (f);

(d) in subsection (b) as redesignated, by striking the comma after "rail carrier" and inserting "or" in lieu thereof and by striking ", or motor common carrier of property" in the second sentence;

(e) in subsection (e) as redesignated by subsection (c) of this section by striking "or (b)";

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(g) by striking subsection (h).

Sec. 23. Section 10706 of title 49, United States Code, is amended—

(a) in subsection (a)(2)(A) by striking "(c)(1)(B)-(E)" and inserting "(d)(1)(B)-(E)" in lieu thereof;

(b) by striking subsection (b)(3)(D) and by redesignating subsections (b)(3)(E) through (b)(3)(H) as subsections (b)(3)(D) through (b)(3)(G); and

(c) by striking subsection (b)(4) and by redesignating subsection (b)(5) as subsection (b)(4).

Sec. 24. Section 10708 of title 49, United States Code, is amended—

(a) in subsection (d)(1) by striking "motor common carrier of property or";

(b) in subsections (d)(1)(A) and (d)(1)(B) by striking "carrier" each time it appears and inserting "freight forwarder" in lieu thereof;

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* * * *

Sec. 36. Section 10762 of title 49, United States Code, is amended—

(a) in subsection (a)(1) by striking the last sentence; and

(b) by striking subsection (g).

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Sec. 38. The analysis of chapter 107 of title 49, United States Code, is amended—

(a) by striking

"10732. Food and grocery transportation." and inserting in lieu thereof

"10732. Backhaul allowances.";

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"10733. Rates for transportation of recyclable materials." and inserting in lieu thereof

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Enclosure 9

Section by Section Analysis of the Trucking Deregulation Act of 1985

[Excerpt]

This bill eliminates all federal economic regulation of the trucking industry; it eliminates entry controls and rate regulation; eliminates antitrust immunity for collective ratemaking; eliminates tariff publication requirements; eliminates the "common carrier obligation"; and transfers jurisdiction for consumer protection in household goods operations to the Federal Trade Commission.

There is vigorous competition not only within the for-hire motor carrier industry, but also from other elements of the transportation sector, such as private trucking, freight forwarders, and railroads, and potential competition from independent owner-operators, as well. Hence, there is no need for continued regulation of the trucking industry.

Section 1

The short title of the bill is the "Trucking Deregulation Act of 1985."

Section 2

The purpose of the bill is to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of transportation by motor carriers of property in the United States.

Section 3

This section states the findings of Congress. It sets out that the statutes governing Federal regulation of motor carriers of property are outdated and must be revised to reflect transportation needs and realities of the present and future; and that government regulation has resulted in operating inefficiencies and anticompetitive pricing and should be reduced.

Section 4

This section amends the transportation policy of the Interstate Commerce Act to reflect the elimination of economic regulation of motor carriers of property.

Section 5

This section amends section 10102(12) of title 49 USC by further defining motor carrier as used in subtitle IV of title 49 as only meaning a motor carrier of passengers. It clarifies that the intent of this Act is to remove Interstate Commerce Commission regulation of motor carriers of property.

Section 6

This section deletes the procedural guidelines of section 10322 of title 49 USC for handling applications involving motor carrier transportation incidental to trailer on flatcar or container on flatcar service by rail or registration certificates for foreign motor carriers. This is a conforming change, since this legislation eliminates the necessity for applying to the Interstate Commerce Commission for any kind of motor carrier authority.

Section 7

This section amends section 10521 of title 49 USC to remove Interstate Commerce Commission jurisdiction over motor carriers of property, with one limited exception regarding household goods carriers. This exception allows the Interstate Commerce Commission to maintain jurisdiction over motor carrier transportation of household goods for three years after the effective date of the Act, for the limited purposes of retaining special antitrust immunity for household goods van lines (so that they can continue to engage in certain business relationships with their own local agents) and of retaining the Interstate Commerce Commission's power to approve or disapprove pooling agreements between a van line and its

agents. This jurisdiction over household goods carriers is retained for three years in order to minimize possible disruption resulting from the eventual removal of all special antitrust immunity for household goods van line-agent relationships. The delayed effective date of removal of immunity will give van lines and their agents additional time to develop corporate business structures and relationships that do not require special antitrust immunity.

* * * *

Section 22

This section amends section 10705 of title 49 USC by removing the authority of the Interstate Commerce Commission over motor common carriers of property to prescribe through routes, joint classifications, joint rates, the division of rates, and the conditions under which those routes must be operated.

Section 23

This section amends section 10706 of title 49 USC by removing Interstate Commerce Commission jurisdiction for providing antitrust immunity to motor carriers of property. Under the provisions of section 83 of this legislation, elimination of antitrust immunity will occur on July 1, 1986. This section does not disturb antitrust immunity for motor carriers of passengers or other carriers.

Section 24

This section amends section 10708 of title 49 USC to remove Interstate Commerce Commission jurisdiction to investigate, suspend, revise, or revoke any rate of a motor common carrier of property on the grounds that such rate is unreasonably high or low. The "zone of rate freedom" provided by the Motor Carrier Act of 1980 would remain applicable only to freight forwarders.

* * * *

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Section 37

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Section 38

This section makes changes in the analysis of Chapter 107 of title 49 to conform to the changes made in sections 19 through 37.

(3)

No. 85-21

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, ET AL., PETITIONERS

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), compels dismissal of a claim for damages under the Sherman Act (15 U.S.C. 1) in an action brought by shippers alleging that carriers engaged in conduct that clearly violated a rate bureau agreement approved by the Interstate Commerce Commission.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Discussion	6
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 9
Board of Trade v. *ICC*, 646 F.2d 1187 14
California v. *FPC*, 369 U.S. 482 10
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 ..... 7, 9, 12
Chicago Mercantile Exchange v. *Deaktor*, 414 U.S. 113 8
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480 17
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 9
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 9
Far East Conference v. *United States*, 342 U.S. 570 12
FMC v. *Seatrain Line, Inc.*, 411 U.S. 726 ..... 11, 17
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 18
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 11
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 ..... 4, 9
Hawaii v. *Standard Oil Co.*, 405 U.S. 251 4
Hughes v. *Rowe*, 449 U.S. 5 6
ICC v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984) 10, 13
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 ..... 4, 9
Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 ..... *passim*
Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 12

Cases—Continued: Page

Lower Lake Erie Iron Ore Antitrust Litigation, MDL 587 (E.D. Pa. June 6, 1985) 19
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 12
MCI Communications Corp. v. *AT&T*, 708 F.2d 1081, cert. denied, 464 U.S. 891 ..... 10, 13
Minsky v. *Auto Driveaway Co.*, 757 F.2d 718, cert. denied, No. 84-457 (Nov. 13, 1984) 18
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985) 17
National Gerimedical Hospital v. *Blue Cross*, 452 U.S. 378 11
Niagara Frontier Tariff Bureau, Inc.—Agreement, 297 I.C.C. 494 2
Northern Pac. Ry. v. *United States*, 356 U.S. 1 17
Otter Tail Power Co. v. *United States*, 410 U.S. 366 ..... 9, 10, 17
Pennsylvania R.R. v. *United States*, 363 U.S. 202 8
Phonetele, Inc. v. *AT&T*, 664 F.2d 716, cert. denied, 459 U.S. 1145 10
Rate Bureau Investigation, 349 I.C.C. 811 14
Reiter v. *Sonotone Corp.*, 442 U.S. 330 ..... 17, 18
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 8
Silver v. *New York Stock Exchange*, 373 U.S. 341 ..... 10, 11
Southern Motor Carriers Rate Conference v. *United States*, No. 82-1922 (Mar. 27, 1985) 13
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 9
Strobl v. *New York Mercantile Exchange*, No. 84-7328 (2d Cir. July 5, 1985) 10
Union Labor Life Insurance Co. v. *Pireno*, 458 U.S. 119 11
United States v. *Borden Co.*, 308 U.S. 188 ..... 10, 11
United States v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499 8
United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 12

Cases—Continued: Page

United States v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 2
United States v. *Philadelphia National Bank*, 374 U.S. 321 ..... 10, 11
United States v. *RCA*, 358 U.S. 334 10
United States v. *Western Pac. R.R.*, 352 U.S. 59 8
United States Navigation Co. v. *Cunard Steamship Co.*, 284 U.S. 474 12
Weinberger v. *Hynson, Westcott & Dunning*, 412 U.S. 609 17
Wheat Rail Freight Rate Antitrust Litigation, In re, 759 F.2d 1305, petition for cert. pending, No. 85-112 ..... 18, 19
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 9

Constitution, statutes and rule:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 12
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* 16
Interstate Commerce Commission Act, 49 U.S.C. 10101 *et seq.*:
49 U.S.C. 10101 note 15
49 U.S.C. 10101a(1) 17, 19
49 U.S.C. 10706 2
49 U.S.C. 10706(b)(2) 2
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* 15
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.* 19
Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 *et seq.*:
§ 5a, 62 Stat. 472 2
§ 5a(6), 62 Stat. 473 3
Sherman Act, 15 U.S.C. 1 *et seq.* 3
Shipping Act, 46 U.S.C. 814 7
Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101(a), 94 Stat. 1897 ..... 17, 19
Fed. R. Civ. P. 23 7

Miscellaneous: Page

H.R. Rep. 96-1069, 96th Cong., 2d Sess. (1980) 15
Interstate Commerce Commission:
37th Annual Report of the Interstate Commerce Commission (1923) 13
Collective Ratemaking in the Trucking Industry (1983) 15
ICC 80 (1981) 16
ICC 83 (1984) 13
D. Wyckoff & D. Maister, *The Motor Carrier Industry* (1977) 15

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY, ET AL., PETITIONERS

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

The issue in this case is whether this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), should be applied to bar an antitrust damage action based on conduct that, absent the implied immunity created in *Keogh*, would violate the Sherman Act. The United States has primary responsibility for enforcement of the antitrust laws. It therefore has a substantial interest in urging that immunities from the antitrust laws be recognized only where essential to the attainment of other congressional regulatory objectives and only to the extent intended by Congress.

STATEMENT

1. Petitioners are two corporations that purchased trucking services from respondent motor carriers. The carriers are members of respondent Niagara Frontier Tariff Bureau, Inc. (NFTB), a rate bureau that operates pursuant to an Agreement approved by the Interstate Commerce Commission (ICC). Under the Agreement, respondents may set rates collectively and, if they comply with various notice and hearing and record-keeping requirements set forth in the Agreement and ICC regulations, the Reed-Bulwinkle Act immunizes their conduct from challenge under the antitrust laws. See 49 U.S.C. 10706.[1]

In 1983 petitioners filed separate class action complaints[2] alleging that respondents had violated the

[1] 49 U.S.C. 10706(b)(2) codifies Section 5a of the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472. It provides that an ICC-approved Agreement among carriers "may be * * * carried out under its terms and under the conditions required by the [ICC], and the antitrust laws * * * do not apply to parties and other persons with respect to making or carrying out the agreement." The Agreement in this case was approved by the ICC in *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I.C.C. 494 (1955).

[2] The complaints, originally filed in the United States District Court for the District of Columbia, were transferred to the Western District of New York, where a complaint filed by the United States containing essentially the same allegations was then pending. The government suit resulted in a consent decree enjoining respondents from discussing rates except "within an authorized ratemaking body of a rate bureau with a rate agreement," and from "harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates." *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167, at 66,533 (W.D.N.Y.).

Sherman Act, 15 U.S.C. 1 *et seq.*, by conspiring during a fifteen year period to " 'fix, raise and maintain prices and to inhibit or eliminate competition * * * without complying with the terms of the NFTB [A]greement and by otherwise engag[i]ng in conduct that either was not or could not be approved by the ICC' " (Pet. App. 39a). Specifically, the complaints alleged that the tariffs filed by respondents through the NFTB were set by a clandestine " 'Principals Committee' " in violation of the Agreement. Petitioners also claimed that respondents resorted to "threats, coercion and retaliation" to prevent carriers from exercising their statutory right[3] to file tariffs independently. Petitioners sought monetary and injunctive relief.

Respondents moved for judgment on the pleadings, arguing that petitioners' damages claims were barred by *Keogh* v. *Chicago & N.W. Ry.* (*Keogh*), 260 U.S. 156 (1922). The district court found *Keogh* controlling and dismissed the complaint in its entirety (Pet. App. 43a-50a).[4]

2. The court of appeals, in an opinion by Judge Friendly, affirmed in part and reversed in part (Pet. App. 1a-42a).

Point-by-point, the court of appeals examined why the four factors that formed the basis for the holding in *Keogh* "do not seem so compelling today as

[3] Under Section 5a(6) of the Reed-Bulwinkle Act, 62 Stat. 473, a rate bureau agreement must afford each carrier "the free and unrestrained right to take independent action either before or after any determination arrived at" collectively.

[4] The district court also concluded that the petitioners' allegation of a "broader conspiracy" to inhibit competition involving conduct not related to rates was insufficient to avoid dismissal under *Keogh* (Pet. App. 48a-50a).

they did in 1922" (Pet. App. 9a). First, in response to the concern expressed in *Keogh* that antitrust damages might result in forbidden discrimination among shippers,[5] the court of appeals observed that such fear was "scarcely applicable to class actions" that provide more uniform relief (*id.* at 10a). Second, *Keogh* referred to the difficulty of determining whether the "hypothetical lower rate" proposed as the benchmark for assessing antitrust damages would have been approved by the ICC as reasonable and "non-discriminatory" (260 U.S. at 164). The court of appeals noted (Pet. App. 11a) that in light of the "many later cases" where "similar issues" had been referred to the ICC, the situation was now quite different from that which obtained in 1922. The third factor in the *Keogh* rationale was the difficulty in proving injury because lower rates might have been passed on to shippers' customers. 260 U.S. at 165. But, as the court of appeals commented (Pet. App. 12a), this Court has itself labeled as dictum *Keogh*'s reference to "passing-on" (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968)), and recent decisions of this Court appear to reject that rationale altogether. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 723-726 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Hanover Shoe, Inc.*, 392 U.S. at 487-494.

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[5] This Court noted in *Keogh* that antitrust damages would, in effect, provide to successful plaintiffs a "rebate" not shared by shippers who chose not to sue. Even among several plaintiffs, moreover, it was "highly improbable" that different courts and juries would provide to each the same measure of relief and that, too, would give some shippers a preference over competitors. 260 U.S. at 163.

The court of appeals also questioned as "no longer seem[ing] so self-evident" *Keogh*'s central premise —that a rate the ICC has determined to be "legal" cannot be illegal under the antitrust laws (Pet. App. 13a). The court reasoned that the existence of a "zone" within which a rate might fall and still pass muster under the Interstate Commerce Act would allow shippers to base an antitrust action on the difference between the rate actually charged and the "lower but still reasonable rate that would have prevailed under free competition" (*ibid.*). Moreover, the court noted (*ibid.*) that post-*Keogh* precedent had firmly established that "implied exemptions to antitrust liability are 'strongly disfavored,'" and that "activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity." Finally, the court found (Pet. App. 15a) that "[t]he case for reaching a contrary conclusion today to that reached" in *Keogh* "is particularly strong in light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates."

Although the court of appeals found (Pet. App. 3a) "much of the reasoning of *Keogh* * * * outdated," it held that *Keogh*'s "language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court" (Pet. App. 3a). Accordingly, the district court's order was affirmed insofar as it dismissed damage claims based on the respondents' rate-fixing activities.[6]

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[6] As to petitioners' claims for injunctive relief, however, the court of appeals reversed. It also indicated that petitioners should be allowed to amend their complaints "to state claims for damages other than damages arising from the filed tariffs." Pet. App. 36a-40a.

DISCUSSION

The United States believes that review by this Court is appropriate. In its present posture, the case does not require the Court to decide whether respondents' conduct violated the antitrust laws. Nor does this case implicate the express immunity that would be available under the Reed-Bulwinkle Act if respondents had complied with their ICC-approved Agreement. Rather, deeming the allegations of the complaint to be true,[7] respondents have engaged in conduct that violated the Agreement and that is illegal per se under the antitrust laws. The question presented is whether carriers can violate both their Agreement and the Sherman Act and yet be immune from a treble damage action. Despite its serious doubts about the continued soundness of *Keogh*, the court of appeals felt compelled to affirm the district court's dismissal of the rate-related portions of the complaints. We submit that for the reasons stated by the court of appeals, this Court should consider whether the balance struck in *Keogh* remains a proper formulation for accommodating the objectives of the antitrust laws and the Interstate Commerce Act. Numerous post-*Keogh* developments in antitrust and other areas of the law, and in the regulatory environment, render that 1922 decision an anomaly in 1985. The issue of *Keogh*'s continued vitality is important, for its prohibition of private damage actions in cases of this sort substantially undermines congressional efforts to substitute competition for regulation in the motor carrier and other industries.

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[7] Since the complaint was dismissed on the pleadings, its allegations must for present purposes be taken as true. See, *e.g.*, *Hughes* v. *Rowe*, 449 U.S. 5, 10 (1980).

1. In *Keogh*, a shipper brought an antitrust action alleging that various railroads had violated the Sherman Act by conspiring to fix tariffs filed with and ultimately approved by the ICC. The Court held that a shipper could not maintain a private antitrust damage action for rates filed with the ICC, advancing for this conclusion the four reasons Judge Friendly addressed below.

As the court of appeals' opinion persuasively demonstrates, developments in antitrust and other areas of the law since 1922 have substantially eroded the foundations of *Keogh*. For example, *Keogh*'s notion that antitrust damages are inimical to a regulatory scheme aimed at preventing discrimination among shippers at the hands of carriers was rejected by this Court in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 219 n.3 (1966).[8] In any event, as the court of appeals noted (Pet. App. 10a-11a), a class action under Fed. R. Civ. P. 23—a procedural device unavailable in 1922—effectively relieves *Keogh*'s fear that piecemeal litigation would result

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[8] *Carnation* involved an antitrust damage action brought by shippers against water carriers. The shippers claimed that the carriers had fixed rates in a manner that did not qualify for express immunity under Section 15 of the Shipping Act, 46 U.S.C. 814, which, like the Reed-Bulwinkle Act, immunizes collective ratemaking undertaken pursuant to an agreement approved by the regulatory agency. In rejecting the claim that antitrust damages would violate the Shipping Act's objective of preventing discrimination among shippers, this Court stated that "Congress was concerned with assuring equality of treatment by [carriers], not with equality of treatment by juries in collateral proceedings," and noted that "[t]here is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others." 383 U.S. at 219 n.3.

in lack of uniformity and, hence, discrimination among shippers. 260 U.S. at 163.

Similarly, although in 1922 there may have been "no conceivable proceeding" in which the ICC could pass on the validity of a hypothetical rate proposed as the standard for measuring antitrust damages, 260 U.S. at 164, that is not necessarily the case today. As the court of appeals observed, since *Keogh* was decided this Court itself has in "many * * * cases * * * directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" (Pet. App. 11a).[9] Moreover, the fact that a particular tariff filed in violation of an ICC-approved agreement may be "reasonable" does not establish that a lower tariff is unreasonable, *i.e.*, that it would be rejected by the ICC as falling below a "zone of reasonableness * * * between maxima and minima within which a carrier is ordinarily free to adjust its charges." *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935).

Keogh also expressed apprehension that a shipper would be unable to demonstrate that it was in fact injured, or to present anything but wholly speculative proof on the measure of damages. 260 U.S. at 165. These concerns rested not on any conflict between the antitrust laws and the Interstate Commerce Act but instead on views that this Court has since reconsidered regarding the proof necessary to

[9] See, *e.g.*, *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 62-70 (1956); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 203-206 (1960). See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (antitrust action stayed pending administrative determination of validity of defendant's conduct under regulatory statute); *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

sustain an antitrust damage award. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. at 491 n.8, this Court characterized as "dictum" *Keogh*'s statement that a shipper might not be able to prove damages because a lower rate might have been "passed-on" to its customers. And this Court's decision in *Illinois Brick Co.* v. *Illinois*, *supra*, established that *only* those parties who, like petitioners, purchase directly from a defendant can recover antitrust damages.[10]

Finally, one of *Keogh*'s basic premises—that because Congress provided some form of regulatory relief it could not have also intended to provide an antitrust remedy—is not tenable today. This Court repeatedly has held that the existence of a remedy under a regulatory statute does not, standing alone, preclude a plaintiff from seeking relief under the antitrust laws. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. at 224 (availability of reparations under the Shipping Act does not bar damage award in antitrust suit); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-375 (1973) (Federal Power Commission's authority to compel interconnection does not preclude court from ordering interconnection in an antitrust action);

[10] In numerous cases decided subsequent to *Keogh*, this Court has emphasized that an antitrust plaintiff is not required to demonstrate the amount of its damages with "mathematic precision." See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 & n.7 (1962); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-265 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 378-379 (1927).

United States v. *Philadelphia National Bank*, 374 U.S. 321, 351-352 (1963) (banking agency's approval of merger does not bar Clayton Act challenge); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (neither the Securities Exchange Act nor stock exchange rules posed a legal barrier to antitrust action); *United States* v. *RCA*, 358 U.S. 334, 344 (1959) (Federal Communications Act does not bar antitrust suit against television and radio licensees); *United States* v. *Borden Co.*, 308 U.S. 188, 195-199 (1939) (neither the Agricultural Adjustment Act nor the Capper-Volstead Act displaced the Sherman Act); *California* v. *FPC*, 369 U.S. 482 (1962) (Clayton Act not displaced by the Natural Gas Act).[11] Lower courts have similarly rejected arguments that a regulatory remedy precludes antitrust relief. See, *e.g.*, *Strobl* v. *New York Mercantile Exchange*, No. 84-7328 (2d Cir. July 5, 1985), slip op. 5028-5031; *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1102-1103 (7th Cir.), cert. denied, 464 U.S. 891 (1983); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 734-735 (9th Cir. 1982), cert. denied, 459 U.S. 1145 (1983).

2. Continued application of *Keogh* is also inconsistent with this Court's numerous subsequent holdings that implied immunity from the antitrust laws is disfavored. Because the antitrust laws embody "fundamental national policies" favoring competition (*Otter Tail Power Co.* v. *United States*, 410 U.S. at

[11] Indeed, in *ICC* v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), this Court stated (slip op. 6) that "[w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under [the Interstate Commerce Act] and whatever additional amounts the antitrust laws allow"; see also slip op. 7 (O'Connor, J., dissenting).

374), implied immunity is appropriate only where there is a "plain repugnancy between the antitrust and regulatory provisions" (*United States* v. *Philadelphia National Bank*, 374 U.S. at 350-351) (footnote omitted), and even then "only to the minimum extent necessary [to] make the [statutory scheme] work." *Silver* v. *New York Stock Exchange*, 373 U.S. at 357. In short, as this Court noted in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1975), "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." See also *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 126 (1982); *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981); *FMC* v. *Seatrain Line, Inc.*, 411 U.S. 726, 733 (1973).

The presumption against implied antitrust immunity is particularly compelling where, as here, Congress has crafted a regulatory scheme that provides for express antitrust immunity. Under such circumstances the scope of immunity should not extend beyond the limits laid down by statute, because "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States* v. *Borden Co.*, 308 U.S. at 201. It strains credulity to suggest that, in granting express immunity in the Reed-Bulwinkle Act for collective ratemaking undertaken in conformity with an ICC-approved Agreement, Congress intended to immunize conduct that violates such an Agreement and thereby subverts both the Reed-Bulwinkle Act and the Sherman Act.[12] Collective ratemaking out-

[12] We agree with the court of appeals that Congress did not "overrule" *Keogh* in passing the Reed-Bulwinkle Act (Pet. App. 25a). But there is also no indication that in passing that

side the scope of an expressly immunized Agreement is naked price fixing; allowing shippers to bring private damage actions would further both regulatory and antitrust objectives by ensuring that carriers comply with the terms of their ICC-approved Agreement when they set rates collectively rather than competitively.

Nor would antitrust damages subject respondents in this case to "duplicative and inconsistent standards," or otherwise interfere with the operation of the regulatory scheme. See *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 735 (1975). As the court of appeals noted (Pet. App. 14a n.3), an antitrust damage award premised on a rate lower than that filed by a carrier would not necessarily pose even a theoretical inconsistency

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Act Congress intended to fix by legislative fiat the balance this Court struck in *Keogh* in 1922 between the Interstate Commerce Act and the antitrust laws. The issue in this case is whether *Keogh*'s judicially-crafted immunity currently provides the proper accommodation of the Sherman Act and a particular regulatory scheme. In the 63 years since *Keogh* was decided this Court's approach to implied immunity questions has evolved substantially; over the same period of time there have been significant changes in the regulatory environment governing respondents' conduct. There is thus no reason to conclude that the result reached in *Keogh* is "cast in bronze." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). Cf. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229-235 (1948) (coverage of Sherman Act evolves with changing judicial conceptions of congressional power under the Commerce Clause). Compare *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. at 220-222, with *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932) and *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

with the ICC's regulatory authority.[13] Moreover, as a practical matter, it is extremely unlikely that damage actions would result in any actual interference with the ICC's exercise of its regulatory authority because, as this Court noted in *ICC* v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), slip op. 6 n.4, the ICC is currently capable of reviewing only an insignificant fraction of the total tariffs filed.[14] There may be cases where the ICC has reached a specific determination that would foreclose certain issues in an antitrust action.[15] When

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[13] Unlike the situation in *Southern Motor Carriers Rate Conference* v. *United States*, No. 82-1922 (Mar. 27, 1985), where the challenged conduct was contemplated under a state regulatory scheme, here it is alleged that respondents violated the ICC-approved ratemaking Agreement. Of course, the present case does not implicate the considerations of comity that informed the Court's decision in *Southern Motor Carriers*.

[14] In 1983 the ICC examined 188 tariffs out of 1.2 million filed, and suspended 11 (Pet. App. 14a n.3); see Interstate Commerce Commission, *ICC 83*, Tables 6 & 8, at 113-114 (1984). By contrast, at the time *Keogh* was decided the total number of tariffs filed annually was approximately eight percent of what it is today. See Interstate Commerce Commission, *37th Annual Report of the Interstate Commerce Commission* 37 (1923) (94,780 tariffs filed). In view of the 1200% increase in tariff filings between 1923 and 1983, in today's regulatory environment the ICC's decision not to investigate a particular tariff surely cannot be regarded as tantamount to regulatory approval. See, *e.g.*, *MCI Communications Corp.* v. *AT&T*, 708 F.2d at 1104-1105 (where agency is able to investigate only a "small percentage" of 1,371 tariffs filed annually, tariff that agency has neither "dictated nor approved" is not immune from antitrust challenge).

[15] Thus, a finding that the challenged conduct was within the terms of the approved Agreement would trigger express immunity under the Reed-Bulwinkle Act. Were respondents

that occurs, steps may be taken, or rulings made, that are suitable to the particular circumstances. But that flexibility is unavailable if *Keogh* is read broadly and applied automatically. Simply because an antitrust damage action might in some cases conflict with a specific ICC determination does not warrant the conclusion that, as a matter of law, no such antitrust damage actions should be permitted. Here, the petitioners allege that respondents have engaged in conduct that was not approved, and could not be approved, by the ICC. Respondents' claim to immunity is therefore reduced to a talismanic invocation of *Keogh*, and should be rejected.[16]

3. The issue this case presents is important, and review by this Court is needed to ensure that congressional efforts to promote competition in the motor carrier and other once extensively regulated industries are not frustrated.

As the facts of this case demonstrate, carriers armed with *Keogh* immunity have a strong incentive to form cartels that flout the intent of Congress in

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to contest whether their conduct in fact violated the ICC-approved Agreement, that issue could be referred to the ICC for determination in the first instance. See *Board of Trade* v. *ICC*, 646 F.2d 1187, 1193 (7th Cir. 1981). The doctrine of primary jurisdiction is, of course, not absolute; it requires referral only where the agency's expertise is necessary to an informed judicial determination. See note 9, *supra*.

[16] The ICC has taken the position that "relief from the antitrust laws * * * obtains only where the approved agreement is carried out strictly in conformity with its provisions and within the terms and conditions prescribed by this Commission" (*Rate Bureau Investigation*, 349 I.C.C. 811, 824 (1975)).

conferring limited express immunity in the Reed-Bulwinkle Act. *Keogh* thus insulates a large and important segment of the national economy from the salutary effects of the antitrust laws.[17] The need to reexamine *Keogh* is all the more pressing in light of Congress's decision, in passing the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, substantially to reduce the regulation of the motor carrier industry.[18] Congress determined that "protective regulation" had given rise to both "operating inefficiencies" and "anticompetitive pricing," 49 U.S.C. 10101 note (Congressional Findings and Declaration of Policy), and in order to combat these problems it greatly relaxed entry restrictions, and

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[17] As of 1980, almost half of the motor carrier industry was subject to ICC regulation (see H.R. Rep. 96-1069, 96th Cong., 2d Sess. 2 (1980)), and that percentage is likely to increase as a result of the relaxed entry standards under the Motor Carrier Act of 1980. In 1979, total revenues in the domestic motor carrier industry (*i.e.*, ICC-regulated carriers and others) amounted to 142.7 billion dollars, and motor carrier services accounted for 24% of total domestic transportation ton-miles. See ICC, *Collective Ratemaking in the Trucking Industry* 72 (1983). Taken together, motor carrier and rail expenditures comprise approximately 93% of total domestic freight transportation expenditures. *Ibid.* Expenditures for domestic freight and passenger transportation consistently account for approximately 20% of gross national product; freight transportation expenditures alone consistently account for approximately nine percent of gross national product. See D. Wyckoff & D. Maister, *The Motor Carrier Industry*, Table I-1, at xxv (1977). Anticompetitive pricing in a basic industry such as transportation, of course, has ramifications throughout the economy.

[18] For a summary of the changes wrought by the Motor Carrier Act of 1980, see *Collective Ratemaking in the Trucking Industry*, *supra*, at 24-25.

narrowed the scope of express immunity available under the Reed-Bulwinkle Act.[19]

The Motor Carrier Act of 1980 is but one example of several recent major pieces of legislation that unmistakably reflect Congress's determination that consumer welfare would be better served if regulated entities were subject, to a much greater extent than in the past, to the free play of competitive forces. The details of deregulation, of course, vary from industry to industry, but the basic thrust of congressional intent—particularly in the domestic transportation sector—could not be clearer: Competition rather than regulation is the order of the day.[20] Since

[19] Although the conduct forming the basis for the complaints here occurred largely if not entirely before the effective date of the Motor Carrier Act of 1980, the rule announced by the court of appeals appears broad enough to permit carriers to argue that post-1980 conduct is immunized as well. Moreover, in the Motor Carrier Act Congress determined that the regulatory scheme applicable prior to 1980 was deficient precisely because it resulted in anticompetitive pricing (see page 15, *supra*). This finding, and the legislative attention it prompted, undermine any argument that allowing an antitrust damage action for pre-1980 conduct outside the scope of express immunity under the Reed-Bulwinkle Act would frustrate congressional intent. Well before the 1980 legislation, the regulatory and decisional premises on which *Keogh* was based had been markedly superseded (Pet. App. 9a-15a), and the practical limits of the ICC's regulatory oversight had been strained by the burgeoning number of tariff filings. Compare Interstate Commerce Commission, *ICC 80*, Table 7, at 113 (605,538 tariffs filed in 1980) with *37th Annual Report of the Interstate Commerce Commission, supra*, at 37 (94,780 tariffs filed in 1923).

[20] See, *e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* (amending Federal Aviation Act of 1958 "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"); Staggers

conduct is now initiated more "by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policy embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States*, 410 U.S. at 374; *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. at 737. That policy, of course, is to promote consumer welfare by encouraging vigorous price competition. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4-5 (1958). And as this Court stated recently in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985), slip op. 20, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."

Conversely, a mechanical application of *Keogh* would " 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947). If the court of appeals is correct that *Keogh* bars private damage actions "whenever tariffs have been filed" (Pet. App. 6a-7a), congressional efforts to promote competition will be severely impeded. Although Congress has greatly limited the substantive authority of the ICC with respect to rail and motor carrier rates, it has not eliminated all regulatory

Rail Act of 1980, Pub. L. No. 96-448, § 101a, 94 Stat. 1897 (codified at 49 U.S.C. 10101a(1)) (in public interest "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail").

oversight. Tariff filing requirements form the foundation of the regulatory regimes administered by the ICC, and these requirements will presumably remain in effect as long as the Commission is empowered to exercise any authority whatsoever with respect to rates. Accordingly, if *Keogh* continues to bar private damage actions whenever a tariff has been submitted to—but not specifically rejected by—the ICC, the perverse result of congressional attempts to encourage competition will be that carriers are free from both regulatory scrutiny and the potent incentive damage actions provide to obey the commands of the antitrust laws.[21]

The decision in this case is but one of several where the lower federal courts have concluded that *Keogh* immunizes carriers from damage liability for activities that are illegal per se under the antitrust laws and outside the scope of express immunity under the Reed-Bulwinkle Act. See *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), petition for cert. pending, No. 85-112; *Minsky* v. *Auto Driveaway Co.*, 757 F.2d 718 (7th Cir. 1984), cert. denied, No. 84-457 (Nov. 13, 1984); *In re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587

[21] Petitioners, being intimately familiar with the industry, are in the best position to monitor the respondents' day-to-day compliance with their ICC-approved Agreement, and have powerful incentives to sue when carriers violate the Agreement. See *Reiter*, 442 U.S. at 344 ("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Thus, this case is of substantial importance to the economy, even though, under *Keogh*, the government may institute enforcement actions and private parties may sue for injunctive relief. See *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

(E.D. Pa. June 6, 1985). Rote application of *Keogh*'s antitrust immunity under such circumstances thwarts competition without providing any benefit to the operation of the regulatory scheme. Thus, review in this case is warranted.[22]

[22] *Keogh* was applied in *In re Wheat Rail Freight Rate Antitrust Litigation, supra*, for example, as a bar to an antitrust damage action against rail carriers in a case where the ICC was precluded by statute from assessing the reasonableness of the rates in question and the *only* regulatory authority the Commission could exercise was whether the rates were discriminatory. The Seventh Circuit's decision thus amounts to a holding that as long as the ICC has any authority over rates, an antitrust action is barred. This outcome flies in the face of Congress's decision in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101(a), 94 Stat. 1897, to allow "to the maximum extent possible, competition * * * to establish reasonable rates for transportation by rail." 49 U.S.C. 10101a(1). A petition for a writ of certiorari in *In re Wheat Rail Freight Rate Antitrust Litigation* is currently pending before the Court (No. 85-112), and if the Court grants review in the present case it may wish to postpone consideration of the petition in No. 85-112 for disposition in light of its decision here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1985

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(8)

No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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INDEX

	Page
Relevant Docket Entries	JA-1
Square D Complaint	JA-4
Big D Complaint	JA-15
Motion of All Defendants for Judgment on the Pleadings as to Plaintiffs' Damage Claims	JA-29

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 83-1958

SQUARE D Co., *Plaintiff*

v.

NFTB, et al., *Defendants*

and

Civ. No. 83-2978

BIG D BUILDING SUPPLY CORP., *Plaintiff*

v.

NFTB, et al., *Defendants*

RELEVANT DOCKET ENTRIES

	1983
Square D Complaint, filed.	July 8
Big D Complaint, filed.	October 7
	1984
Order transferring actions from the District of Columbia to the United States District Court for the Western District of New York	January 23

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civ. No. 84-158C

SQUARE D Co., *Plaintiff*

v.

NFTB, et al., *Defendants*

and

Civ. No. 84-157C

BIG D BUILDING SUPPLY CORP., *Plaintiff*

v.

NFTB, et al., *Defendants*

RELEVANT DOCKET ENTRIES

	1984
Motion of all Defendants for Judgment on the Pleadings as to Plaintiffs' Damage Claims, filed.	March 7
Plaintiffs' Memorandum in Opposition to the above Motion, filed.	April 10
Defendants' Joint Reply to the above Opposition, filed.	May 7
Oral argument held.	June 19
Order consolidating the cases entered.	June 27
Order and Judgment dismissing the complaints entered (596 F. Supp. 153 (W.D.N.Y. 1984)).	September 25
Plaintiffs' Notice of Appeal, filed.	October 9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 84-7831

SQUARE D Co., *et al., Plaintiffs,*

v.

NFTB, et al., *Defendants*

RELEVANT DOCKET ENTRIES

	1984
Appellants' Brief, filed.	November 30
Joint Brief of Appellees, filed.	December 21
	1985
Appellants' Reply Brief, filed.	January 2
Oral argument held.	January 14
Decision affirming in part and reversing and remanding in part entered (760 F.2d 1347 (2nd Cir. 1985)).	April 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOYCE HENS GREEN, J.

COMPLAINT

15 U.S.C. § 1

Class Action for Violations of Antitrust Laws

Civil No.: 83-1958

SQUARE D COMPANY,
Executive Plaza
Palantine, Illinois 60067
312-387-2600

Plaintiff,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC.,
BONDY CARTAGE LIMITED,
DOMINION-CONSOLIDATED TRUCK LINES LIMITED,
ICL INTERNATIONAL CARRIERS, LTD.,
INTER-CITY TRUCK LINES (CANADA), INC.,
TNT CANADA, INC.,

Defendants.

Filed: July 8, 1983

Trial by Jury Demanded

JURISDICTION

1. This action arises under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief and to recover treble damages and the costs of suit, including a reasonable attorneys' fee, for the injuries sustained by plaintiff and the members of the class which it represents resulting from violations by the defendants of Section 1 of the Sherman Act, 15 U.S.C. § 1. The juris-

diction of this Court is founded on Section 1 of the Sherman Act (15 U.S.C. § 1), on Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26), on 28 U.S.C. § 1337 and on 28 U.S.C. § 1391.

2. Each defendant is found, transacts or does business in the District of Columbia or in the United States.

THE PARTIES

3. Plaintiff, Square D Company, is a Michigan corporation having its principal place of business at Executive Plaza, Palantine, Illinois. Square D purchased freight transport by motor carrier between the United States and the Province of Ontario, Canada from one or more of the defendants during the period of time covered by this Complaint.

4. Niagara Frontier Tariff Bureau, Inc. ("NFTB" or "Bureau") is made a defendant herein. NFTB is a non-profit, no share incorporated bureau organized and existing under the laws of the State of New York with offices in Williamsville, New York. NFTB's permissible activities are described in a rate bureau agreement approved by the ICC.

5. Bondy Cartage Limited ("Bondy") is made a defendant herein. Bondy is a corporation organized and existing under the laws of the Province of Ontario, Canada with its headquarters in Windsor, Ontario. It is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

6. Dominion-Consolidated Truck Lines Limited ("Dominion Consolidated") is made a defendant herein. Dominion-Consolidated is a corporation organized and existing under the laws of the province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of Dominion-Consolidated Holdings Limited,

also an Ontario corporation, headquartered in Toronto, Ontario. Dominion-Consolidated was formed in 1970 by the merger of two Ontario-based motor carriers, Dominion Freightways Limited and Consolidated Truck Lines. Dominion-Consolidated is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

7. ICL International Carriers, Ltd. ("ICL") is made a defendant herein. ICL is a corporation organized and existing under the laws of the province of Ontario, Canada with a head office in Windsor, Ontario. It is a subsidiary of Industrial Cartage Co., Inc., a Michigan corporation, which in turn is wholly-owned by Piggy Back Services, Inc., a Michigan corporation headquartered in Detroit, Michigan. ICL is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

8. Inter-City Truck Lines (Canada), Inc. ("Inter-City") is made a defendant herein. Inter-City is a corporation organized and existing under the laws of the province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of N.M. David Corporation Limited, an Ontario corporation. Inter-City is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

9. TNT Canada, Inc. ("TNT") is made a defendant herein. TNT is a corporation organized and existing under the federal laws of Canada with headquarters in Mississauga, Ontario. TNT is a subsidiary of All Trans Canada, Inc., an Ontario corporation which in turn is owned by Thomas Nationwide Transport, Ltd. of Sydney, Australia. TNT was formed in March 1980 through the amalgamation of several companies including Overland Western Limited

("Overland Western"), a motor carrier holding extra-provincial and common carrier authority. Subsequent to the amalgamation, Overland Western's operations were subsumed in the Overland Express Division of TNT. TNT is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

CO-CONSPIRATORS

10. In addition to the above-named defendants, other persons and entities participated as co-conspirators with the defendants in the violations alleged herein and acted in furtherance thereof.

CLASS ACTION ALLEGATIONS

11. Plaintiff herein brings this action for itself and as a representative of all members of a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The class represented by plaintiff is composed of all persons, excluding defendants, their subsidiaries and parents, and excluding government entities, which, during the period of time covered by this complaint, purchased freight transport by motor carrier between the United States and the Province of Ontario, Canada from defendants. This class is so numerous, being in the thousands, that joinder of all members is impracticable. Plaintiff is an established corporation which routinely purchased freight transport between various locations in the United States and the Province of Ontario, Canada during the period of the violation. There are questions of law and fact common to the plaintiff and all other class members with respect to the violations of the Sherman Act alleged. These common questions predominate over any questions affecting only individual members. There would be little, if any, interest among members of the class in individually controlling the prosecution of these actions. On information and belief no liti-

gation other than that instigated by the United States government has been filed with respect to these violations. Like the present action, the government's civil action is already lodged in this Court. The claims asserted herein are similar to those in other antitrust class actions, including antitrust class actions involving the purchase of transport service, and present no unusual problem in the management of a class action. This class action is superior to other alternatives for the adjudication of this controversy.

DEFINITIONS

12. As used herein, the term:

a) "Person" means any natural person, firm, partnership, association or corporation;

b) "Motor carrier" means a person providing motor vehicle transportation of freight for compensation;

c) "Common carrier authority" means operating authority granted to a motor carrier by the Interstate Commerce Commission ("ICC");

d) "Ontario Highway Transport Board" means the Ontario governmental agency that regulates motor carrier transportation in, to or from Ontario, Canada;

e) "Extra-provincial authority" means authority granted to a motor carrier by the Ontario Highway Transport Board ("OHTB") to transport freight across the United States/Ontario border;

f) "Rate bureau" means an organization established or continued under an agreement approved by the ICC under 49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706 (b)(2);

g) "Tariff" means rates, fares and charges filed with a governmental agency by a motor carrier or rate bureau for the transportation and handling of freight.

TRADE AND COMMERCE

13. Motor carrier transportation is the primary means of transporting freight between the United States and Canada. A substantial portion of United States/Canadian freight traffic flows into, from or through the Province of Ontario.

14. To transport freight across the U.S./Canadian border, a motor carrier must have the requisite governmental authority. To engage in the transportation of interstate or foreign commerce of the United States, a motor carrier must obtain operating authority from the ICC (49 U.S.C. § 303(c), currently codified at 49 U.S.C. § 10921). To operate into or from the Province of Ontario, it must also obtain extra-provincial authority from the OHTB.

15. During all or part of the time pertinent to this complaint, the defendant motor carriers held extra-provincial and common carrier authority.

16. In addition to regulating operating authority, both the ICC and the OHTB regulate some other, but not all, aspects of motor carrier transportation. The ICC requires motor carriers transporting freight pursuant to common carrier operating authority to file with the ICC in Washington D.C. tariffs which contain all rates for transportation, to make the tariffs available for public inspection, and to implement changes in rates only after thirty days notice to the ICC and the public, unless the ICC specifically grants permission for a shorter notice period (49 U.S.C. § 317, currently codified at 49 U.S.C. § 10762). The ICC is empowered in certain circumstances to determine and prescribe just and reasonable rates for motor carriers; it does not, however, dictate motor carriers' rates in the first instance (49 U.S.C. § 316, currently codified at 49 U.S.C. § 10704). The OHTB similarly requires motor carriers to file tariffs, to adhere to the rates in the tariffs and to

implement changes only after 30 days notice; it does not prescribe rates.

17. The Reed-Bulwinkle Act, which was passed in 1948, authorizes two or more motor carriers subject to the jurisdiction of the ICC to apply to it for approval of an agreement to establish a rate bureau to set rates collectively (49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706 (b)(2). Upon ICC approval, parties to such an agreement are relieved from the operation of the antitrust laws, provided their actions conform to the procedural requirements set forth in the approved agreement. Every such agreement must reserve to each of its members the right to take a rate action independent of the rates set collectively by the rate bureau (49 U.S.C. § 5b(6), currently codified at 49 U.S.C. § 10706(b)(2)(B)(ii). Relief from the antitrust laws under the Reed-Bulwinkle Act is strictly limited to the terms of the approved agreement, and it does not extend to conduct that the ICC is not empowered to authorize, or if empowered, has not authorized.

18. During all or part of the time covered by this complaint, each of the motor carriers named as defendants herein was a party to the collective ratemaking agreement approved by the ICC for the NFTB. Niagara Frontier Tariff Bureau—Agreement, 297 I.C.C. 494 (1955) (hereinafter "NFTB agreement"). The NFTB agreement remained in effect for all times pertinent to this complaint. The NFTB agreement authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada, through authorized committees, provided the carriers adhered to the procedures set forth in the NFTB agreement and ICC regulations, including a variety of notice, publication and public hearing procedures. At all times pertinent to this complaint. the NFTB agreement preserved each carrier's right to take independent action.

19. The international traffic revenues of NFTB carriers with the requisite authority to transport freight across the United States/Canada border were at least $330.3 million in 1980 and $344.8 million 1979. For the period 1970 through approximately 1980, international traffic revenues of such NFTB carriers were $2.8 billion. The defendant motor carriers and their co-conspirators accounted for most of the cross-border traffic among NFTB motor carriers.

20. The transportation of freight between the United States and the Province of Ontario, Canada is in the interstate and foreign commerce of the United States and affects the interstate and foreign commerce of the United States.

VIOLATIONS ALLEGED

21. Beginning at least as early as 1966 and continuing at least into 1981, the exact dates being unknown to the plaintiff, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce of the United States in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC.

23. In furtherance of the aforesaid combination and conspiracy the defendants and co-conspirators have done those things that they combined and conspired to do, including among others:

a) Participated in a Principals Committee which was comprised of the senior management officials of NFTB carriers that had extra-provincial authority. The Principals Committee was not authorized or approved by the ICC to engage in ratemaking conduct. Through the Principals Committee, the defendants and co-conspirators engaged in the joint setting of rates and related policies and also agreed upon methods by which to inhibit competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada;

b) Set and controlled NFTB rate levels without complying with the notice, publication, public hearing or record keeping requirements of the NFTB agreement and ICC regulations;

c) Held Principals Committee and other meetings to plan threats, coercion and retaliation against an NFTB member carrier for exercising its right of independent action;

d) Through pressure, coercion, threats of retaliatory rate reductions, taking retaliatory rate reductions, internal NFTB practices, and other means, interfered with, restrained and restricted the right of NFTB member carriers and non-member carriers to make rates independent of the NFTB agreed-upon rates;

e) Filed tariffs with the ICC in Washington, D.C. that were in furtherance of the conspiracy.

EFFECTS

24. The combination and conspiracy has had the following effects:

a) Rates for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada have been fixed, raised or maintained at artificial and non-competitive levels;

b) Competition between and among the defendant motor carriers, their co-conspirators and other persons engaged in the transportation of freight by motor carrier between the United States and Ontario, Canada has been restrained;

c) Competition generally in trade and commerce in the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada has been suppressed;

d) Purchasers of freight transport between the United States and the Province of Ontario, Canada were deprived of free and open competition.

FRAUDULENT CONCEALMENT

25. Plaintiff had no knowledge of the above-described antitrust violations or any facts which might have led to the discovery thereof until July 1983. Plaintiff could not have discovered the violations at an earlier date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by the defendants and their co-conspirators to avoid detection of and fraudulently conceal such violations.

INJURY

26. As a direct result of the unlawful conduct of defendants and their co-conspirators alleged herein, since at least 1966, plaintiff and the members of the class have not been able to purchase transportation at rates determined by free and open competition and have been injured in their business and property in that they have paid more for motor freight transport between the United States and the Province of Ontario, Canada than they would have paid in a freely competitive market.

PRAYER FOR RELIEF

WHEREFORE PLAINTIFF PRAYS THAT:

(A) The Court adjudge and decree that each defendant has engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act.

(B) Plaintiff and members of the class recover threefold the damages determined to have been sustained by each of them respectively.

(C) Each defendant, its successors, assignees, subsidiaries, and transferees, and its respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid violations of the Sherman Act.

(D) This Court grant such other, further and different relief as may be deemed just and proper.

(E) Plaintiff and members of the class recover the costs of this suit, together with a reasonable attorneys fee.

TRIAL BY JURY IS DEMANDED

FOLEY, LARDNER, HOLLABAUGH & JACOBS

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Dated: 8 July 1982

JOYCE HENS GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 83-2978

BIG D BUILDING SUPPLY CORP.
200 Broadway
Saranac Lake, New York
Individually and on behalf of
all others similarly situated,
Plaintiff

VS.

NIAGARA FRONTIER TARIFF BUREAU, INC.,
BONDY CARTAGE LIMITED,
DOMINION-CONSOLIDATED TRUCK LINES, LTD.
ICL INTERNATIONAL CARRIERS, LTD.,
INTER-CITY TRUCK LINES, LTD.,
TNT CANADA, INC.,
Defendants

[Filed October 7, 1983]

COMPLAINT - CLASS ACTION

Jury Trial Demanded

Plaintiff, by its undersigned attorneys, brings this civil action against the above named defendants for injunctive relief and for treble damages due to defendants' violations of the antitrust laws, and alleges as follows:

I. JURISDICTION AND VENUE

1. This action arises under Section 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief

and to recover damages and the costs of suit, including a reasonable attorneys' fee, for the injuries sustained by plaintiff and the members of the class which it represents resulting from violations by the defendants and their co-conspirators, as hereinafter alleged, of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1337.

3. Each of the defendants named in this Complaint transacts business within this District, and each of said defendants is within the jurisdiction of this Court for the purpose of service. Many of the unlawful acts done pursuant to the combination and conspiracy hereinafter alleged have been performed within this District. The interstate commerce described hereinafter is carried on, in part, within this District. Venue is laid in this District pursuant to the provisions of 15 U.S.C. § 22 and 28 U.S.C. § 1391. The defendants are found or transact business or are doing business in this Judicial District and/or the claim arose in this District.

II. PLAINTIFF

4. Plaintiff, Big D Building Supply Corp., is a corporation formed under the laws of the State of New York. Plaintiff is engaged in, *inter alia*, the business of distributing, wholesaling and retailing plumbing fixtures and supplies. In the course of its business and during the period of time covered by this Complaint, plaintiff utilized the services of defendants and/or their co-conspirators in the transportation of goods to and from New York State and Ontario, Canada. Plaintiff has been injured in its business or property by reason of the antitrust violations alleged herein.

III. DEFENDANTS

5. The corporations named below are made defendants herein. Each of said defendants is either incorporated under the laws of a State of the United States of America or the Province of Ontario, Canada.

(a) Niagara Frontier Tariff Nureau, Inc. ("NFTB" or "Bureau") is made a defendant herein. NFTB is a non-profit, no share incorporated rate bureau organized and existing under the laws of the State of New York with offices in Williamsville, New York. NFTB's permissible activities are described in a rate bureau agreement approved by the ICC.

(b) Bondy Cartage Limited ("Bondy") is made a defendant herein. Bondy is a corporation organized and existing under the laws of the Province of Ontario, Canada with its headquarters in Windsor, Ontario. It is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(c) Dominion-Consolidated Truck Lines Limited ("Dominion Consolidated") is made a defendant herein. Dominion-Consolidated is a corporation organized and existing under the laws of the province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of Dominion-Consolidated Holdings Limited, also an Ontario corporation, headquartered in Toronto, Ontario. Dominion-Consolidated was formed in 1970 by the merger of two Ontario based motor carriers, Dominion Freightways Limited and Consolidated Truck Lines. Dominion-Consolidated is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(d) ICL International Carriers, Ltd. ("ICL") is made a defendant herein. ICL is a corporation organized and

existing under the laws of the Province of Ontario, Canada with a head office in Windsor, Ontario. It is a subsidiary of Industrial Cartage Co., Inc. a Michigan corporation, which in turn is wholly-owned by Piggy Back Services, Inc., a Michigan corporation headquartered in Detroit, Michigan. ICL is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(e) Inter-City Truck Lines (Canada), Inc. ("Inter-City") is made a defendant herein. Inter-City is a corporation organized and existing under the laws of the Province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of N.M. Davis Corporation Limited, an Ontario corporation. Inter-City is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(f) TNT Canada, Inc. ("TNT") is made a defendant herein. TNT is a corporation organized and existing under the federal laws of Canada with headquarters in Mississauga, Ontario. TNT is a subsidiary of All Trans Canada, Inc., an Ontario corporation which in turn is owned by Thomas Nationwide Transport, Ltd. of Sydney, Australia. TNT was formed in March, 1980 through the amalgamation of several companies including Overland Western Limited ("Overland Western"), a motor carrier holding extra-provincial and common carrier authority. Subsequent to the amalgamation, Overland Western's operations were subsumed in the Overland Express Division of TNT. TNT is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

IV. CO-CONSPIRATORS

7. Various persons not made defendants participated as co-conspirators with the defendants in the violations alleged herein and have performed acts and made statements in furtherance thereof.

V. CLASS ACTION ALLEGATIONS

8. Plaintiff, Big D Building Supply Corp., brings this action on behalf of itself and as a class action under the provisions of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure as representative of the class defined herein:

(a) The class consists of all individuals, proprietorships, partnerships, corporations and other business entities, in the United States (excluding defendants, their subsidiaries and their affiliates) who have, during the period of time covered by the conspiracy alleged in the Complaint, engaged the services of the defendants and their co-conspirators for the transportation of goods between the United States and the Province of Ontario, Canada.

(b) The members of the class are so numerous as to make joinder of the class members impracticable. Plaintiff is presently unable to state the precise size of the class, which plaintiff believes numbers in the thousands; however, the size of the class and the identity of its members should be readily ascertainable from defendants' own books and records.

(c) Plaintiff will fairly and adequately protect the interests of the class. The interest of plaintiff is co-incident with, and not antagonistic to, that of the remainder of the class. In addition, plaintiff is represented by experienced and able counsel who have both prosecuted and defended antitrust class actions.

(d) Plaintiff's claims are typical of those to be asserted by the class. Except as to the amount of damages each member of the class has by itself sustained, all other questions of law and fact are common to the class.

(e) Because the only non-common issue is the amount of individual damages to each particular class member, common questions of law and fact plainly predominate. Class action treatment is a superior method for the fair and efficient adjudication of the controversy herein described, because it permits a large number of injured persons, the joinder of whom is impracticable, to prosecute their common claim in a single forum simultaneously. The class members are readily identifiable from information in the hands of the defendants, and the class action provides an efficient method whereby the enforcement of their rights can be fairly managed. Plaintiff believes that the class size will not present unusual problems of management or notice.

(f) Each of the members of the class, including plaintiff, has utilized the services of one or more of the defendants and/or their co-conspirators during the period covered by this Complaint and has sustained damages as a result of the combination and conspiracy herein alleged.

VI. DEFINITIONS

9. As used herein, the term:

(a) "Person" means any natural person, firm, partnership, association or corporation;

(b) "Motor Carrier" means a person providing motor vehicle transportation of freight for compensation;

(c) "Common carrier authority" means operating authority granted to a motor carrier by the Interstate Commerce Commission ("ICC");

(d) "Ontario Highway Transport Board" means the Ontario governmental agency that regulates motor carrier transportation in, to or from Ontario, Canada;

(e) "Extra-Provincial Authority" means authority granted to a motor carrier by the Ontario Highway Transport Board ("OHTB") to transport freight across the United States/Ontario boarder;

(f) "Rate Bureau" means an organization established or continued under an agreement approved by the ICC under 49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706(b)(2);

(g) "Tariff" means rates, fares and charges filed with a governmental agency by a motor carrier or rate bureau for the transportation and handling of freight.

VII. TRADE AND COMMERCE

10. Motor carrier transportation is the primary means of transporting freight between the United States and Canada. A substantial portion of United States/Canadian freight traffic flows into, from or through the Province of Ontario.

11. To transport freight across the U.S./Canadian border, a motor carrier must have the requisite governmental authority. To engage in the transportation of interestate or foreign commerce of the United States, a motor carrier must obtain operating authority from the ICC (49 U.S.C. § 303(c) currently codified at 49 U.S.C. § 10921). To operate into or from the Province of Ontario, it must also obtain extra-provincial authority from the OHTB.

12. During all or part of the time pertinent to this Complaint, the defendant motor carriers held extra-provincial and common carrier authority.

13. In addition to regulating operating authority, both the IPC and the OHTB regulate some other, but not all,

aspects of motor carrier transportation. The ICC requires motor carriers transporting freight pursuant to common carrier operating authority to file with the ICC in Washington, D.C. tariffs which contain all rates for transportation, to make the tariffs available for public inspection, and to implement changes in rates only after thirty days notice to the ICC and the public, unless the ICC specifically grants permission for a shorter notice (49 U.S.C. § 317, currently codified at 49 U.S.C. § 10762). The ICC is empowered in certain circumstances to determine and prescribe just and reasonable rates for motor carriers; it does not, however, dictate motor carriers' rates in the first instance (49 U.S.C. § 316, currently codified at 49 U.S.C. § 10704). The OHTB similarly requires motor carrier to file tariffs, to adhere to the rates in the tariffs and to implement changes only after 30 days notice; it does not prescribe rates.

14. The Reed-Bulwinkle Act, which was passed in 1948, authorizes two or more motor carriers subject to the jurisdiction of the ICC to apply to it for approval of an agreement to establish a rate bureau to set rates collectively, 49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706(b)(2). Upon ICC approval, parties to such an agreement are relieved from the operation of the antitrust laws, provided their actions conform to the procedural requirements set forth in the approved agreement. Every such agreement must reserve to each of its members the right to take a rate action independent of the rates set collectively by the rate bureau (49 U.S.C. § 5b(6), currently codified at 49 U.S.C. § 10706(b)(2)(B)(ii)). Relief from the antitrust laws under the Reed-Bulwinkle Act is strictly limited to the terms of the approved agreement, and it does not extend to conduct that the ICC is not empowered to authorize, or if empowered, has not authorized.

15. During all or part of the time covered by this complaint, each of the motor carriers named as defendants

herein was a party to the collective ratemaking agreement approved by the ICC for the NFTB. Niagara Frontier Tariff Bureau—Agreement, 297 I.C.C. 494 (1955) (hereinafter "NFTB agreement"). The NFTB agreement remained in effect for all times pertinent to this complaint. The NFTB agreement authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada through authorized committees, provided the carriers adhered to the procedures set forth in the NFTB agreement and ICC regulations, including a variety of notice, publication and public hearing procedures. At all times pertinent to this Complaint, the NFTB agreement preserved each carrier's right to take independent action.

16. The international traffic revenues of NFTB carriers with the requisite authority freight across the United States/Canada border were at least $330.3 million in 1980 and $344.8 million in 1979. For the period 1970 through approximately 1980, international traffic revenues of such NFTB carriers were $2.8 billion. The defendant motor carriers and their co-conspirators accounted for most of the cross-border traffic among NFTB motor carriers.

17. The transportation of freight between the United States and the Province of Ontario, Canada is in the interstate and foreign commerce of the United States and affects the interstate and foreign commerce of the United States.

VIII. VIOLATIONS ALLEGED

18. Beginning at least as early as 1966 and continuing at least into 1981, the exact dates unknown to the plaintiff, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce of the United States in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The aforesaid unlawful combination and

conspiracy may be renewed unless the relief hereinafter prayed for is granted.

19. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC.

20. In furtherance of the aforesaid combination and conspiracy the defendants and co-conspirators have done those things that they combined and conspired to do, including among others:

(a) Participated in a Principals Committee which was comprised of the senior managmeent officials of NFTB carriers that had extra-provincial authority. The Principals Committee was not authorized or approved by the ICC to engage in ratemaking conduct. Through the Principals Committee, the defendants and co-conspirators engaged in the joint setting of rates and related policies and also agreed upon methods by which to inhibit competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada;

(b) Set and controlled NFTB rate levels without complying with the notice, publication, public hearing or record keeping requirements of the NFTB agreement and ICC regulations;

(c) Held Principal Committee and other meetings to plan threats, coercion and retaliation against an NFTB member carrier for exercising its right of independent action;

(d) Through pressure, coercion, threats of retaliatory rate reductions, taking retaliatory rate reductions, internal NFTB practices, and other means, inferfered with, restrained and restricted the right of NFTB member carriers and non-member carriers to make rates independent of the NFTB agreed-upon rate; and

(e) Filed tariffs with the ICC in Washington, D.C. that were in furtherance of the conspiracy.

IX. EFFECT OF THE COMBINATION AND CONSPIRACY

21. The combination and conspiracy has had the following effects:

(a) Rates for the transportation of freight motor carriage between the United States and the Province of Ontario, Canada have been fixed, raised or maintained at artificial and non-competitive levels;

(b) Competition between and among the defendant motor carriers, their co-conspirators and other persons engaged in the transportation of freight by motor carrier in the United States-Ontario, Canada trade has been restrained; and

(c) Competition generally in trade and commerce in the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada has been surpressed.

X. DAMAGES

22. During and throughout the period of the aforesaid combination and conspiracy, plaintiff and members of the class it represents were charged substantial monies for the carriage of cargo by defendants and/or their co-conspirators. By reason of the defendants' and their co-conspirators' illegal conduct, plaintiff and the members of the class it represents were compelled to pay and have paid

substantially higher charges for the carriage of cargo than they would have paid absent defendants' combination and conspiracy.

23. As a result of the defendants' illegal combination and conspiracy, plaintiff and the class it represents have sustained substantial loss and damage in their business and property in an amount which is presently undetermined.

XI. FRAUDULENT CONCEALMENT

24. Prior to June, 1983, plaintiff had no knowledge of the aforesaid antitrust violations, or of any facts which might have led to discovery thereof. Plaintiff could not have discovered the violation at an earlier date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of, and fraudulently conceal, such violations.

XII. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

(a) The Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act;

(b) Plaintiff and other members of the class recover threefold the damages determined to have been sustained by each of them respectively, and that joint and several judgment be entered herein against defendants, and each of them, for the amount determined;

(c) Each of the defendants, successors, assignees, subsidiaries, and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert there-

with, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination, conspiracy, agreement, understanding or concert of action, adopting or following any practice, plan, program or design, having a similar purpose or effect in restraining competition;

(d) Plaintiff and members of the class it represents recover the costs of this suit, together with a reasonable attorneys' fee;

(e) The Court grant such other further and different relief as the case may require and the Court may deem just and proper under the circumstances; and

(f) Plaintiff demands a trial by jury of all issues so triable in this case.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civ. No. 158-C

SQUARE D COMPANY,
Plaintiff,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Defendants.

Civ. No. 157-C

BIG D BUILDING SUPPLY CORP.,
Plaintiff,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC.., *et al.*,
Defendants.

MOTION OF ALL DEFENDANTS FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' DAMAGE CLAIMS

Pursuant to Rules 12(c) and 12(h)(2) Fed.R.Civ.P., Defendants Niagara Frontier Tariff Bureau, Inc., Bondy Cartage Limited, Dominion-Consolidated Truck Lines Limited., ICL International Carriers Ltd., Inter-City Truck Lines (CANADA), Inc. and TNT Canada, Inc. move for judgment on the pleadings as to Plaintiffs' claims for damages in each of the above-captioned actions on the ground that neither Complaint states a claim upon which money damages can be granted, and Defendants are entitled to judgment in their favor on those claims as a matter of law, assuming the truth of all material allegations of the Complaints.

Oral argument is requested.

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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP., *Petitioners,*

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR CERTIORARI FILED JULY 5, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the 1922 Supreme Court decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, today preclude shippers from recovery of damages under the antitrust laws for the conspiratorial acts of a rate bureau and member carriers who knowingly violate the Interstate Commerce Act, related ICC regulations, and their rate bureau agreement?

PARTIES TO THE PROCEEDING

Petitioners Square D Company and Big D Building Supply Corp. are two corporations which shipped commodities between the Province of Ontario, Canada, and the Eastern United States via motor freight carriers belonging to the Niagara Frontier Tariff Bureau. They have brought suit in their individual capacity and on behalf of a class of shippers whose goods were transported by the five defendant motor carrier members of the Niagara Frontier Tariff Bureau. In conformance with Supreme Court Rule 28.1, Square D Company lists the following subsidiaries (except wholly owned subsidiaries) and affiliates: Furukawa Circuit Foil Co., Ltd., Square D (Saudi Arabia), Ltd., Square D (S.A.) and Palatine Hills Leasing, Inc.

The defendants in this action are the Niagara Frontier Tariff Bureau ("NFTB"), a motor carrier rate bureau registered with the Interstate Commerce Commission, and five motor carrier members of the Bureau which are engaged in the transportation of motor carrier freight between Canada and the United States. These carriers are Bondy Cartage Limited; Dominion-Consolidated Truck Lines, Limited; ICL International Carriers Limited; Inter-City Truck Lines (Canada), Inc.; and TNT Canada, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. *Keogh* Concerned Implied Immunity For *Lawful* Joint Ratemaking Activities, Not Immunity For Activities Unlawful Under The Antitrust Laws And Unauthorized By Any Regulatory Plan	10
A. *Keogh* Involved Lawful Ratemaking, Not Deliberate Frustration Of The Regulatory Plan	10
B. Implied Immunity Should Not Extend To Activities Beyond The Ability Or Authority Of A Regulatory Agency To Supervise	11
C. An Antitrust Cause Of Action For Unauthorized Conduct Complements ICC Enforcement Of The ICA	12
II. The Limited Express Antitrust Immunity Granted By Congress In The Reed-Bulwinkle Act Supplanted The Implied Immunity Which Necessitated The Court's *Keogh* Decision	16

TABLE OF CONTENTS continued

	Page
III. The Legislative History Of Reed-Bulwinkle Indicates That Congress Intended To Grant Antitrust Immunity Only For Conduct Supervised And Approved By The ICC	21
A. Only Activities Supervised By The ICC Were Intended To Be Exempt	22
B. The Motor Carrier Reform Act Of 1980 Also Indicates That Congress Intended Reed-Bulwinkle To Grant Only An Express Immunity	29
C. This Court's Parallel Case Law Recognizes That Congress Intends Express Immunity In The Transportation Industry To Displace Previous Implied Immunity	31
IV. In Subsequent Decisions The Court Has Rejected Or Discarded The Principal Points Of The Rationale It Used In Formulating The *Keogh* Result.	33
A. The Possibility That Damage Awards Would Be Equivalent To A Rebate Is Inconsistent With Subsequent Holdings Of The Court And In Any Event Would Not Apply In A Class Action Recovery Suit	34
B. Determining Damages Presents No Extraordinary Problem	35
C. *Keogh*'s Justification That Shippers Could Not Prove Damages Because Transportation Charges Are Passed On To Customers Of The Shippers Has Been Rejected	38
D. Rates Conspiratorially Set In Contravention Of ICC Regulations Necessarily Are Illegal	38
V. Since 1980 The Express Immunity Which Displaced *Keogh*'s Implied Immunity Has Been Further Limited	41
CONCLUSION	44

TABLE OF AUTHORITIES

CASES:	Page
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)	36
California v. *Federal Power Commission*, 369 U.S. 482 (1962)	10
Canter v. *Detroit Edison Co.*, 428 U.S. 579 (1976)	39, 40
Carnation Co. v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966)	*passim*
City of Mishawaka v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978)	37
Fairport, P. & E. R. Co. v. *Meredith*, 292 U.S. 589 (1934)	21
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945)	27
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	18, 31, 37
Gordon v. *New York Stock Exchange*, 422 U.S. 659 (1975)	18
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	38
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	38
ICC v. *American Trucking Ass'n.*, 104 S.Ct. 2458 (1984)	*passim*
Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922)	*passim*
Litton Systems, Inc. v. *American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984)	37
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TABLE OF AUTHORITIES continued

	Page
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973)	18
Silver v. *New York Stock Exchange*, 373 U.S. 344 (1963)	18
Southern Motor Carriers Rate Conference, Inc. v. *United States*, 105 S.Ct. 1721 (1985)	30
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)	36
United States v. *Borden Co.*, 308 U.S. 188 (1939)	17
United States v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶66,167 (W.D.N.Y. 1984)	3
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)	18, 19
Wheat Rail Freight Antitrust Litigation, 579 F. Supp. 517 (N.D. Ill. 1984)	35
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969)	36

STATUTES:

The Reed-Bulwinkle Act, Pub. Law No. 80-662, 62 Stat. 472 (1948)	*passim*
The Motor Carrier Reform Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	29, 36, 41
Interstate Commerce Act, Chap. 104, 24 Stat. 379 (1887)	37
The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)	36
49 U.S.C. § 10706(b)(3)(B)(ii)	3, 13
49 U.S.C. § 10762	14

TABLE OF AUTHORITIES continued

	Page
49 U.S.C. § 11705(b)(3)	34
28 U.S.C. § 1254(1) (1982)	2

MISCELLANEOUS:

S. Rep. No. 96-641, 96th Cong. 2d Sess. (1980)	30, 42, 43
H.R. Rep. No. 1069, 96th Cong. 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 2283	41
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Hearings on S. 110 Before the Senate Comm. on Interstate Commerce, 80th Cong. 1st Sess. (1947)	28, 29
Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce, 79th Cong. 2d Sess. (1946)	28
93 Cong. Rec. 5, 6596, 6598 (1947)	27
Brief for Petitioners ICC (No. 82-1643, October Term, 1983), *ICC* v. *American Trucking Ass'n.*, 104 S.Ct. 2458 (1984)	4
Brief for Respondents ATA (No. 82-1643, October Term 1983), *ICC* v. *American Trucking Ass'n.*, 104 S.Ct. 2458 (1984)	14

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued its Opinion, reproduced in the Appendix to the Petition for Certiorari at pp. 1a-40a, on April 9, 1985. 760 F.2d 1347 (2d Cir. 1985). The Order of the Court of Appeals remanding these actions to the District Court in conformance with the Court's Opinion of April 9, 1985 is reproduced in the Appendix to the Petition at pp. 41a-42a. The Opinion of the District Court which ordered dismissal of these actions and which gave rise to the appeal is reproduced in the Appendix to the Petition at pp. 44a-50a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 9, 1985. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 5(b)(9) of the Reed-Bulwinkle Act, 62 Stat. 472 (1948).

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

STATEMENT OF THE CASE

This case reaches the Court upon a judgment on the pleadings pursuant to F.R. Civ. P. 12(c) and 12 (h)(2) rejecting plaintiffs' claim for damages. Accordingly, the material factual allegations of the complaints are to be taken as true and correct for purposes of deciding the legal issue upon which the dismissal of the claim was predicated. Briefly stated, those facts are as follows.

Beginning at least as early as 1966 and continuing until at least 1981, the Niagara Frontier Tariff Bureau ("NFTB"), an organization authorized by the Interstate Commerce Commission ("ICC") to engage in joint ratemaking activities under the supervision of

the Commission, and certain motor carrier members of the NFTB engaged in price fixing and coercive activities which violated their ICC approved ratemaking agreement. In addition to knowingly violating the rate bureau agreement, the defendants engaged in anticompetitive conduct including activities other than collective ratemaking. Such conduct was not approved by the ICC.[1]

The coercive conduct in which the Bureau and the individual trucking company defendants engaged prevented other trucking companies from exercising their lawful statutory right to file individual rates with the ICC. This conduct not only was not authorized by the ICC, but was beyond the power of the ICC to authorize.[2]

More specifically, executives of the NFTB and senior management officials of the defendant truckers organized a so-called "Principals Committee," the existence of which was kept secret from the ICC and from shippers. This Principals Committee engaged in price

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[1] The factual allegations of the present civil complaint for damages parallel those of a United States government antitrust action against the NFTB and the individual motor carrier defendants which was settled through the entry of a consent decree forbidding continuation of the anticompetitive conduct. *United States* v. *Niagra Frontier Tariff Bureau, Inc.*, 1984-2 CCH Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. June 26, 1984).

[2] The right of a motor tariff bureau member to make a unilateral tariff filing with the ICC frequently is referred to as the right of "independent action." This right has been guaranteed since 1948 by the Reed-Bulwinkle Act, formerly 49 U.S.C. § 5b(6) (1976), currently codified at 49 U.S.C. § 10706(b)(3)(B)(ii) and, ostensibly, by the NFTB Rate Bureau Agreement on file with the ICC. NFTB Bylaws effective June 1, 1981, Article XVII.

fixing, planned boycotts, made threats and took other actions designed to prevent competition and to increase the rates on motor freight traffic between the Province of Ontario, Canada, and the Eastern United States. Pursuant to the illegal conspiracy, the defendants filed numerous tariffs with the ICC, virtually all of which went into effect without suspension or investigation. The vast majority of the collusive tariffs received only a cursory review for obvious defects or no review at all by the ICC.[3]

These tariffs fixed prices at artificially high levels as determined through the secret and conspiratorial agreements reached in the defendants' "Principals Committee." The NFTB tariffs affect a sizable volume of motor freight traffic moving between the Province of Ontario and states in the Northeastern, Mid-Atlantic and Midwest area of the country. The international (United States-Canada) revenues for motor freight

[3] In its brief to the Court in *ICC* v. *American Trucking Ass'n.*, 104 S.Ct. 2458 (1984), the Commission explained that until 1979, it examined filings prior to their effective date for "obvious defects." By 1979, however, budget restrictions forced the Commission to reallocate its resources and the ICC determined that it could no longer maintain sufficient tariff examiners to pre-examine every filing. In October 1979, the Commission began reviewing only a random sampling of tariff filings. Currently, the Commission examines only the title pages of tariff filings. Brief for Petitioners ICC at 3 (No. 82-1643, October Term 1983).

> As a practical matter, therefore, unless a defect is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

Id. at 3. Interested parties—e.g., the shippers who have to pay the tariff charges—of course are unable to call defects to the attention of the Commission when the defects are hidden from them through conspiratorial activities.

traffic moving under tariffs filed by NFTB carriers exceeded 2.8 billion dollars between 1970 and 1980.

In addition to damages flowing directly from the collusively set rates, shippers also have been deprived of the benefit of lower rates which would have been available if motor carriers desiring to file independent tariffs had not been coerced into withholding such filings. Moreover, the availability of independently determined lower freight rates inevitably would have restrained tariff increases in joint rate filings by the Niagara Frontier Tariff Bureau's member companies.

Respondents are two shippers who were injured by paying these excessive costs for motor freight transportation between the United States and Canada. They filed antitrust actions to recover damages they sustained both on their own part and as representatives of a class of shippers injured by the defendants' actions. The defendants moved to dismiss all of these claims for damages asserting that under the precedent of *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), it is impossible for shippers to recover such damages under the antitrust laws. Agreeing with the defendants, the District Court dismissed the damage claims, and on appeal the Court of Appeals for the Second Circuit reluctantly affirmed the dismissal.[4] Judge Friendly, writing for the Court of Appeals, specifically noted that many of the arguments advanced by this Court in support of its decision in *Keogh* "do not seem

[4] The Circuit Court did remand the action to the District Court to enable plaintiffs to pursue a claim for injunctive relief to prevent further violations of the antitrust laws and to permit plaintiffs to amend their complaint in the event they had any damage claims not barred by the *Keogh* doctrine.

so compelling today" as they did in 1922. The Court of Appeals nonetheless stated that "[w]hile agreeing with appellants that much of the reasoning of *Keogh* seems outdated, we hold that its language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court." *Square D* v. *NFTB,* Appendix to the Petition for Certiorari at p. 3a.

SUMMARY OF ARGUMENT

Regulatory policy would be distorted and the public would suffer unwarranted injury if companies which receive the benefits of non-competitive pricing through antitrust immunity obtained pursuant to a regulatory plan can deliberately circumvent the regulatory framework and retain anticompetitively high profits. The Sherman Act declared a national policy of open competition in the marketplace, and exceptions to this policy pertaining to regulated industries have been and must be conditioned upon compliance with the regulatory plan. If regulated companies are able to retain excessive profits obtained through knowing circumvention of the governing regulations, then the public interest would suffer in two respects: the public will have paid too much money for products or services whose price supposedly is governed by the regulatory plan; and the credibility of the regulatory process will have been subverted.

The 1922 *Keogh* decision was a Court-generated expression of implied immunity which was necessary at that date to accommodate the national policy preventing price fixing expressed in the antitrust laws and the ICC's approval of jointly submitted transportation rates. The Court understood that Congress could

not have intended to subject the regulated carriers to damage claims for such ICC-approved rate setting.

The implied immunity recognized by the Court in *Keogh* applies, however, only when the behavior being immunized itself is in compliance with an approved regulatory plan. The fact situation presented to the Court in *Keogh* concerned rail carriers whose jointly agreed upon rates had been submitted to the ICC for review and approval. The ICC had held public hearings at which Keogh, the complaining shipper, appeared to oppose the proposed rates. Thus, the *Keogh* fact situation did not involve conspiratorial activities to subvert the regulatory process but rather it involved immunity based upon compliance with that process. There is no indication in the *Keogh* decision that the Court intended to extend the implied immunity necessitated by the Sherman Act-Interstate Commerce Act dichotomy to immunize activities designed to profit by avoidance of the Interstate Commerce Act.

The Court's statement of implied immunity in *Keogh* has been extended by some lower courts to apply antitrust immunity in all situations in which regulated entities make filings with their supervisory agency. The so-called "filed rate doctrine" is said by some courts to extend to activities which do not even involve the filing of rates but instead the suppression of rate filings. In the instant actions, for example, the *Keogh* decision is claimed to shield a range of anticompetitive conduct including the defendants' coercive suppression of other motor carriers' proposals to file independent and lower rates with the ICC. The *Keogh* protection also is asserted to apply to collective decisions not to file lower rates. Under this expansive interpretation of *Keogh,* the Congressional intent in

creating a regulated method of setting joint common carrier rates is undermined, and shippers pay excessive freight rates. The public then is deprived of the benefit it is supposed to obtain through regulated competition and the conspirators profit through avoiding the Congressional intent of the regulation. It is not likely that this reading of *Keogh* was intended by the Court, even in 1922.

The necessity for the judicially created immunity which the Court granted in *Keogh* was eliminated in 1948 by the passage of the Reed-Bulwinkle Act. Pub. L. No. 80-662, 62 Stat. 472 (formerly at 49 U.S.C. § 5b (1976)). In Section 5(b)(9) of that Act, Congress specified the circumstances under which an express statutory immunity would be available to motor carriers. Parties to an agreement approved by the ICC were relieved from the operation of the antitrust laws solely "with respect to the carrying out of such agreement *in conformity with its provisions*" and "*in conformity with the terms and conditions prescribed by the Commission.*" (Emphasis added.)

In the present action, the defendant motor carriers claim immunity (and the corresponding ability to retain illegal overcharges) notwithstanding the fact that they neither carried out their ratemaking agreement in conformity with its provisions nor complied with terms and conditions prescribed by the Commission. In short, the defendant truckers insist that Congress did not intend for them to be bound by any *quid pro quo* in which the grant of express antitrust immunity for joint ratemaking was conditioned upon compliance with the regulatory plan. This self-serving and self-enriching interpretation of *Keogh* conflicts directly with numerous post-*Keogh* decisions of this Court

which emphasize that implied immunity is disfavored, especially when Congress has granted an express immunity. Where there is express immunity, it is to be construed strictly, and unauthorized conspiratorial actions are not exempt from antitrust damage claims.

Moreover, as Judge Friendly recognized, the rationale employed when the Court grappled with the implied immunity question it faced in 1922 long since has been rejected by this Court. *See Square D* v. *NFTB,* Appendix to the Petition for Certiorari at pp. 9a-15a. Today, the defendant carriers rely on *Keogh* for the proposition that they cannot be asked to restore illegal overcharges to shippers they have cheated outside of the confines of the regulatory plan because an outdated and rejected rationale relieves them from any necessity of answering for the damages they occasioned. Any such reliance on *Keogh* has been misplaced since at least 1948, when Congress granted express immunity.

The availability of an antitrust cause of action to recover damages for conduct which has not been immunized by an agency pursuant to its regulations has been recognized by this Court in other shipping industry cases, such as *Carnation Co.* v. *Pacific Westbound Conf.,* 383 U.S. 213 (1966) and *ICC* v. *American Trucking Ass'n.,* 104 S. Ct. 2458 (1984). The continued recognition by lower courts of *Keogh*-based immunity for activities outside of the authority or ability of an agency to regulate makes no sense and contravenes the public policy expressed in the Sherman Act. Accordingly, the Court should rule that *Keogh*'s implied immunity does not extend to activities which violate a regulatory plan or to activities which are beyond the ability of the regulatory agency to approve.

ARGUMENT

I. *Keogh* Concerned Implied Immunity For *Lawful* Joint Ratemaking Activities, Not Immunity For Activities Unlawful Under The Antitrust Laws And Unauthorized By Any Regulatory Plan

Reference to the factual situation which the Court confronted in *Keogh* is a logical starting point in interpreting the extent of the immunity the Court found necessary to grant. It is axiomatic that "immunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962). Implied immunity, therefore, should be no more extensive than necessary to alleviate the problem which caused the Court to make limited suspension of the national economic policy of free competition declared in the antitrust laws.

A. *Keogh* Involved Lawful Ratemaking, Not Deliberate Frustration Of The Regulatory Plan

Keogh was a flax manufacturer who brought suit under the antitrust laws charging that a uniform rate agreement among rail carriers resulted in his paying excess rates as compared to those which prevailed prior to the collectively agreed upon tariff. As the Court noted, however, every rate of which he complained had been duly filed by the several carriers with the ICC, and "upon such filing the rates had been suspended for investigation, upon complaint of Keogh." *Keogh, supra*, 260 U.S. at 160. There were "extensive" hearings in which Keogh participated, and not until the rates had been approved by the Commission subsequent to these hearings did they become effective. Only then did Keogh file a complaint under the antitrust laws. This is a far cry from the present situation

in which the carriers (1) violated the terms of their ICC-approved bureau agreement; (2) deliberately and secretly set out to raise rates outside of the authority granted under their tariff bureau agreement, and (3) coercively prevented other carriers from exercising a statutory right to file independent tariffs.

It is doubtful that *Keogh*'s intended effect, even in 1922, was to immunize unauthorized conduct. The application of *Keogh* to unsupervised conduct was not an issue the Court had to consider when it dealt with the apparently contradictory language of the Interstate Commerce Act and the Sherman Act.

B. Implied Immunity Should Not Extend To Activities Beyond The Ability Or Authority Of A Regulatory Agency To Supervise

Immunity under the antitrust laws whether implied or express is founded on a premise that the regulatory authority is able to supervise and review the ratemaking activities of the entities which are immunized. It would be a sorry exchange indeed if the public were to give up the right to free competition and competitive prices in circumstances where the regulatory authority is unable to protect the public from exorbitant prices because it lacks the capacity to supervise the pricing activities.[8] In *Keogh*, the ICC had exercised its supervisory function and, in fact, had heard *Keogh*'s specific complaints about the tariffs in ques-

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[8] Even if a regulatory agency has sufficient resources available to prevent collusive tariffs from becoming effective, there is no reason why tortfeasors should be able to claim immunity under a regulatory plan they have violated. A rule that any claim to immunity is lost with respect to conspiratorial conduct which violates the regulatory plan protects the public interest.

tion. In the present action, the ICC was not able to supervise the collusive rates for a number of reasons. First, of course, it did not know about the collusion since the existence and activities of the "Principals Committee" were kept secret from it. Second, it was unable to review rates which the defendants *prevented* from being filed. Third, it could not approve lower rates which the conspirators jointly decided *not to file* with the ICC. Fourth, as indicated by the ICC itself, the Commission does not have the means to review the hundreds and hundreds of thousands of tariff filings it receives each year. According to the ICC Annual Report for the year 1983, the Commission received more than 1,200,000 tariff filings in that year alone. Of this total, only 188 were subjected to examination by the Commission and only 11 suspensions were ordered.

C. An Antitrust Cause Of Action For Unauthorized Conduct Complements ICC Enforcement Of The ICA

In large measure, the ICC must depend upon the carriers it regulates to comply with their rate bureau agreements and not to violate the Interstate Commerce Act. Moreover, it is contrary to the public interest to permit carriers to retain illegal profits. To the extent the antitrust laws help to prevent this result, they assist in maintaining the integrity of the ICC regulatory process.

Disadvantaged shippers are unable to obtain effective relief from the ICC when rate conspiracies are pervasive, massive, and extend over a long period of time.[6] The reason for this was pointed out in *ICC* v.

[6] The ICC regulatory plan contemplates shipper participation in an open rate-setting process. This opportunity is denied when the carriers formulate rates secretly. The ICC is victimized because the statutorily designed process by which it may receive shipper complaints is frustrated.

ATA, supra, 104 S.Ct. at 2463, n.4, where the Court noted that the ICC reviews "only a random sampling of tariff filings," and that tariffs with obvious defects inevitably are permitted to go into effect. In that case, the ICC acknowledged its inability to ensure that all carriers are in compliance with the ICA and applicable regulations. It informed the Court that it regards the availability of antitrust damage actions as an important adjunct to its supervisory authority.[7]

There certainly is no conflict between the ICC's supervisory authority over tariffs and an antitrust

[7] First, the Commission argues that without the potential for overcharge damage awards, shippers will not have sufficient incentive to report rate-bureau violations to the Commission or to file antitrust suits on their own. . . . In the Commission's view, the threshold remedies of peremptory rejection of proposed rates and suspension of rates pending investigation are inadequate to cope with substantial violations, which are typically shrouded in secrecy and undetectable on the face of a tariff proposal. . . .

ICC v. *ATA, supra,* 104 S.Ct. at 2467. The Commission was arguing for the necessity of the tariff rejection remedy to make its enforcement authority effective. Although it upheld the Commission's authority, the Court took into account the potentially large awards which conceivably could be made if the Commission exercised this potentially powerful remedy.

> Overcharge awards can easily surpass the damages for which carriers have historically been liable under § 11705(b)(3), and may even exceed the treble damages to which the carriers are vulnerable under the antitrust laws.

Ibid. It seems apparent that the Court considered that shippers injured by conspiracies occurring outside the ICC-approved conduct have a right to file damage suits under the antitrust laws.

cause of action for shippers who are damaged by unapproved conduct. In fact, the availability of an antitrust cause of action complements the ICC's regulation of the motor carrier industry. It is obvious that if the ICC can investigate only about 200 tariff filings per year, it would encounter extreme difficulty in policing a conspiracy which involves thousands of collusively filed tariffs. The possibility of an antitrust damage claim assists in preventing unauthorized conduct and in reducing the ICC's enforcement burden.

The American Trucking Association filed a brief in *ICC* v. *ATA* in which the truckers themselves made the point that the ICC's investigative powers and its authority to reject tariffs which do not comply with agency regulations do not prevent unreasonable or unlawful rates from going into effect. Brief for Respondents ATA at p. 11 (No. 82-1643, October Term 1983), *ICC* v. *ATA, supra.*[8] Tariffs become effective automatically 30 days after they are filed in accordance with 49 U.S.C. § 10762. The overwhelming majority of tariffs go into effect without any supervision by the ICC.[9] Therefore, although the ICC retains its authority as the first-line regulator of motor carrier tariffs, the availability of an antitrust remedy to shippers is of vital assistance to the proper functioning of

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[8] [T]he ICC's rejection and investigation powers do not prevent rates that may be unreasonable or otherwise unlawful from becoming effective if they are filed in accordance with 49 U.S.C. § 10762. . . .

Id. at 11. The ATA's brief was filed on behalf of the ATA and the NFTB, the defendant herein.

[9] Since the Niagara Frontier defendants' activities constituted a secret conspiracy, there was, of course, no opportunity for shippers even to ask for an investigation during the 30-day notice period before the rate automatically becomes effective.

the ICC's regulatory plan. Denial of an antitrust remedy would leave shippers at the mercy of a regulatory plan which is vulnerable to deliberate circumvention.

Yet another limitation on the availability of remedies which in theory may be available under the Interstate Commerce Act is the Act's two-year statute of limitations for shippers to assert reparations claims. Not only is this period inadequate for shippers to act upon suppressed illegal activities, but, to the plaintiff shippers' knowledge, there has been no determination that the doctrine of fraudulent concealment tolls the Interstate Commerce Act's two-year limitation clause. Thus, shippers may lack any remedy at all at the ICC for damages in instances of long-term conspiracies.

Lastly, although the Court's *ICC* v. *ATA* decision acknowledged the authority of the Commission to cancel retroactively tariffs currently in effect, the decision did not discuss whether *expired* tariffs may be cancelled. If the Commission has no authority to cancel tariffs once they have expired, then the sole means of recovery for overcharges attributable to these tariffs will be through prosecution of an antitrust damage action.[10]

For all of these reasons, the only realistic method of recovering illegal overcharges available to shippers is through an action under the antitrust laws. The ability to maintain such suits complements the ICC's own enforcement efforts and restrains carriers from the temptation to circumvent the Commission's policies.

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[10] Even assuming that the ICC may have authority to seek retroactive recission of expired tariffs, it may have scant inclination to do so.

II. The Limited Express Antitrust Immunity Granted By Congress In The Reed-Bulwinkle Act Supplanted The Implied Immunity Which Necessitated The Court's *Keogh* Decision

In 1948, Congress amended the Interstate Commerce Act by passing the Reed-Bulwinkle Act, Section 5(b)(9) of which resolved the prior disparity between the Sherman Act's anti-price fixing provision and the Interstate Commerce Act's contemplation of ICC-regulated joint ratemaking. In unambiguous terms, Section 5(b)(9) relieved parties to agreements approved by the Commission from the operation of the antitrust laws *only* "with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

The immunity granted under Reed-Bulwinkle is both comprehensive in affording carriers an opportunity to engage in lawful joint ratemaking and express in spelling out the conditions under which such lawful ratemaking may occur. The immunity granted by Congress is limited to the "making" and the "carrying out" of the rate bureau agreement. The immunity does not extend to collusive activities which are not contemplated by the agreement or necessary to its implementation. Further, in order to secure antitrust immunity, the parties to an approved agreement must carry out the agreement in conformity with its terms and in conformity with the terms and conditions prescribed by the Commission. The conduct challenged herein violated both of these provisos.

The principle that compliance with the regulatory plan is a *quid pro quo* for immunity is reinforced when the anticompetitive conduct is actually forbidden

by the regulatory plan. There can be no reason for granting an implied immunity from the antitrust laws for activity which Congress has outlawed with specificity. Section 5(b)(9) of Reed-Bulwinkle limited the express immunity provision to items which themselves were not prohibited by paragraphs 4, 5 or 6 of the Act. Section 5(b)(6) of the Reed-Bulwinkle Act explicitly provides that motor carriers shall have the right to file independently determined tariffs without interference by a rate bureau or by rate bureau members.[11] Carriers belonging to a rate bureau are prohibited from attempting to dissuade (let alone coerce) another carrier from filing an independent action with the ICC. There cannot be an implied immunity for conduct which is forbidden under the Interstate Commerce Act.

This Court repeatedly has held that immunity from the antitrust laws represents a limited exception to the overriding economic policies incorporated in the Sherman Act. In *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939), Chief Justice Hughes affirmed that "the Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce" and he went on to distinguish limited exceptions to that policy which occurred under certain regulatory programs. In *Borden*, the regulatory program was the Agricultural Act, and the Court noted that the Agricultural Act (like the Reed-Bulwinkle Act) is a limited

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[11] Section 5(b)(6) states:

> The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

statute which applies to designated transactions which are to be regulated in a prescribed manner.

> The Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. . . .
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> These explicit provisions requiring official participation and authorization show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

Id. at 200 and 201.

As discussed above, the implied immunity to the antitrust laws under *Keogh* was needed because prior to the passage of the Reed-Bulwinkle Act, it fell to the Court to accommodate different policy considerations in the Sherman Act and the Interstate Commerce Act. The Court since has stated, however, that any immunity occasioned by the need to accommodate otherwise inconsistent statutes is itself to be narrowly construed. Even in cases of plain statutory repugnancy, antitrust immunity is recognized only "'if necessary to make the [statutory scheme] work and *even then only to the minimum extent necessary.*'" (Emphasis added.) *Gorden* v. *New York Stock Exchange,* 422 U.S. 659, 683 (1975), quoting *Silver* v. *New York Stock Exchange,* 373 U.S. 344, 357 (1963). Moreover, the Court has characterized any implied exemption—such as the *Keogh* doctrine—as "strongly disfavored." *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51 (1963); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372 (1973); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975).

The rule that creation of an express immunity, as in Reed-Bulwinkle, supplants any implied immunity was reiterated in *Carnation, supra,* 383 U.S. 213. There the Court noted that the Shipping Act contained an explicit provision exempting designated activities from Sherman Act prohibitions. As in the instant case, the express exemption covered approved agreements, lawful under the regulatory statute, but had no application to the implementation of unapproved agreements. The Court held that:

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, e.g., *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 10 L ed 2d 915, 83 S Ct 1715.

Id. at 218.

This holding has been applied with consistency. Express exemptions to the antitrust laws are to be strictly construed, and implied exemptions will not be recognized unless there is a repugnancy between a regulatory scheme and the national antitrust policy which requires recognition of an exemption to avoid defeating the regulatory program. Even where an implied exemption is necessary, it will be recognized only to the

minimum extent required to permit the regulatory plan to operate.

Applying this well-established rule to the Interstate Commerce Act, the need for an implied immunity has not existed since the passage in 1948 of an amendment granting express immunity and outlining the terms and conditions on which that immunity will be available.[12] Today, in contrast to the situation which prevailed at the time *Keogh* was decided, no implied immunity is necessary in order for the regulatory plan to function in the manner intended by Congress.[13]

The regulatory agency itself has disclaimed any repugnancy in the applicability of the antitrust law to unauthorized conduct. Thus, the need for *Keogh* vanishes and the express immunity provided by Congress is the only immunity available. For carriers behaving in a lawful manner, this immunity is more than adequate.

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[12] Those terms hardly can be described as onerous. Motor carriers may obtain approval for rate bureau agreements covering hundreds of members, which agreements enable them to file literally thousands of joint tariffs covering the transport of products over multi-state areas. The motor carrier defendants herein are not victims of some good faith administrative oversight on their part which was not intended to and did not impose any harm on shippers. The conduct for which immunity is claimed consists of a deliberate scheme to thwart the ICC regulatory plan and to take advantage of a filed rate bureau agreement so as to extract significant unjustified revenues from shippers who had no knowledge of the conspiracy.

[13] In a word, the defendant truckers' position is that even though they deliberately violated the statute under which they had an express immunity available to them, the Court should grant them an implied immunity which will enable them to retain profits flowing from the violation.

III. The Legislative History Of Reed-Bulwinkle Indicates That Congress Intended To Grant Antitrust Immunity Only For Conduct Supervised And Approved By The ICC

The legislative history of the Reed-Bulwinkle Act supports the view that anticompetitive conduct hidden from the eyes of the ICC never was intended by Congress to be exempt from the antitrust laws.[14] First, as noted, the language of Section 5(b)(9) of the Reed-Bulwinkle Act clearly states that immunity is granted *only* with respect to agreements which conform to ICC-approved provisions and which conform with conditions prescribed by the Commission. Since the plain words of the statute are unambiguous with respect to the immunity being granted and the limitations on that immunity, the prevailing rule that the language of the statute will govern without necessity of further reference to the legislative history should apply. *Fairport, P.&E. R. Co.* v. *Meredith,* 292 U.S. 589, 594 (1934). Nonetheless, the legislative history buttresses the conclusion that in passing this legislation Congress intended to define the extent of antitrust immunity available to carriers and the conditions with which they had to comply to obtain and maintain that immunity.

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[14] The Court of Appeals appears to have agreed that enactment of an express exemption overcomes the need for continuing any disfavored implied exemption which was necessary to enable the regulatory statute to achieve its intended purpose. Nonetheless, the Circuit Court, in what it considered to be a case of first impression (*Square D* v. *NFTB,* Appendix to the Petition for Certiorari at p. 19A), came to what petitioners believe is an incorrect reading of Reed-Bulwinkle's legislative history and the superceding of necessity for *Keogh* immunity.

A. Only Activities Supervised By The ICC Were Intended To Be Exempt

Although Congress' intent to grant only limited immunity is easily discernible from the language of the statute and from the House and Senate reports relating to the bill, the overall legislative history of the Act dealt only indirectly with the corresponding elimination of the need for the implied immunity. The references cited by Judge Friendly in the appeals court opinion do not deal with the question of implied immunity *after* passage of Reed-Bulwinkle. In 1948, Congress was concerned with creating an exemption with defined limits and had no need to dwell on the no longer necessary *Keogh* immunity.

Considerations involving the extent of *Keogh* immunity may have been a force in causing Congress to create an express exemption, but they did not require a full-dress legislative burial of the now unnecessary implied immunity. Fairly read, the very limited discussions of *Keogh* during consideration of the Act merely are in the nature of historical references which explain that implied immunity had been necessary to accommodate competing policies and why an express immunity statute was desirable. Indeed, House Report No. 1100 which accompanied the legislation does not even mention *Keogh*.[18] There is nothing in the legislative history to show a Congressional desire to retain

[18] H.R. Rep. No. 1100, 80th Cong. 2d Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News, 1844. The language of the final report is largely identical to H.R. Rep. No. 1212, 79th Cong. 1st Sess. (1945), which accompanied H.R. 2536, a bill which passed the House but did not gain passage by the Senate during the 79th Congress.

an implied immunity greater than the express immunity being granted in the Act.

According to the House Report, legislation addressing the conflict between the antitrust laws and the Interstate Commerce Act's contemplation of joint ratemaking activities was necessitated because, in the early 1940's, the Department of Justice, through court actions and in position statements, had begun to question the legality of the cooperative activities engaged in by carriers through their rate associations. The Report states:

> The problem involved is one of reconciling and harmonizing two great principles of public policy which have been declared by Congress.

H.R. Rep. No. 1100, *supra,* 1948 U.S. Code Cong. & Ad. News at 1847. These were the antitrust laws and the transportation policy set forth in the Interstate Commerce Act. The Report continues:

> The only practical approach to the problem is to grant to a competent administrative agency, as is proposed in the bill, the authority to resolve the conflict *in specific instances of proposed joint action by carriers.* (Emphasis added.)

Id. at 1848.

This Congressional statement of purpose is important. The supervisory authority of the ICC is directed solely to *"proposed"* joint actions, and those joint actions are identified in "specific instances." Congress contemplated a grant of immunity only where the conduct to be immunized was presented to the agency in a context where the agency would have a chance to review it giving due regard to public policy consid-

erations, including competitive pricing considerations. There was no intent to immunize conduct, as presented in the pending NFTB actions, where the illegal agreements were *implemented* rather than *proposed* and where the ICC was deprived of any ability to reject the activities.

The next touchstone to the immunity issue occurs in an ambiguous passage of the Report which states:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

Id. at 1848. The troublesome question arises in the phrase applying the antitrust laws "so far as they are now applicable." The plaintiff shippers herein believe that the most logical construction of this term means that the antitrust laws apply as intended in the Sherman Act. This construction is supported by the next succeeding clause which begins *"except"* as to joint agreements approved by the Commission. If Congress had intended that the antitrust laws should not apply to any rate-related conduct, including unapproved conduct, the entire "exception" clause would have been superfluous.

Furthermore, the sentence as a whole clearly indicates that Congress intended that the ICC be able to make a judgment as to whether relief from the antitrust laws should be granted because the proponent of

the relief had convinced the Commission that such relief would further national transportation policy. The conduct at issue herein, however, was not presented to the Commission and therefore could not have met the intent that the ICC review the conduct in order for immunity to attach. Also, as noted, *supra,* Section 5 (b)(6) of the Reed-Bulwinkle Act states that the Commission "shall *not* approve" agreements which suppress the right to independent action. Since these activities were not eligible for ICC approval, they cannot be exempt from antitrust safeguards.

Thus, the entire exception clause which limits relief from the antitrust laws is contingent upon compliance with the regulatory plan. A contrary interpretation of the "now applicable" wording of the ambiguous sentence of the House Report would negate the exception clause. Congress cannot have intended to give both the express immunity granted to enable the ICC to make an informed decision that specified joint rate activity should be relieved from the operation of the antitrust laws and a blanket implied immunity.[16]

Strong additional support for the conclusion that Congress granted immunity only for authorized conduct is found in H.R. Rep. No. 1100, *supra,* 1948 U.S. Code Cong. & Ad. News at 1855:

> While the *approval* of that basic [rate bureau] agreement by the Commission *operates to relieve*

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[16] That the activity to be immunized must be specified not only is logical but is consistent with the earlier reference to permitting the agency to review "specific instances of proposed joint action by carriers." The defendants herein are arguing that they have obtained immunity for unspecified, and indeed undisclosed, anticompetitive activities.

> the parties thereto from the operation of the antitrust laws with respect to any action taken thereunder, *so long as it is taken in accordance with the agreement* and such terms and conditions as the Commission may attach to its approval, it should be noted that the application of the provisions of the Interstate Commerce Act and other laws is unaffected by the granting of relief from the antitrust laws. (Emphasis added.)

By Congress' own intent, the relief from the antitrust laws which derives from ICC approval of the basic rate agreement is limited to action "taken in accordance with the agreement." This reaffirms that conduct outside of the boundaries of the rate bureau agreement has not been granted relief from the operation of the antitrust laws or any other laws.

As noted, the *Keogh* decision itself received very little comment during the hearings and debates on the Act. The principal debators were legislators from Southern and Western states who were opposed to any exemption for joint ratemaking because they feared that collectively set rates would discriminate against their states in favor of Northern states.[17] The response

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[17] The following colloquy is typical:

> MR. SALTONSTALL. Why is it necessary, then, that this bill be passed, in view of the fact that the Interstate Commerce Commission has been acting on these cases over the period of the last 25 years?
>
> MR. REED. I would say, because the rate bureaus are always faced with a threat of action by the Antitrust Division of the Department of Justice.
>
> MR. BRICKER. Mr. President, if the Senator will yield, it is not only a threat, but an actual prosecution, at the present time.

by the bill's proponents to the reservations expressed lead to the conclusion that the only antitrust immunity being granted was the immunity contained in the Act itself. During the debates, Senator Reed said:

> MR. REED. When the bill came to us it was a wide-open bill. Any agreement between carriers could be submitted to the Interstate Commerce Commission. *We say these agreements must be limited to the things which we describe.* They must be in the public interest. They must not unduly restrain competition. They must be consistent with the national transportation problem. We cannot go any further in limiting the character of the agreements which may be made and offered to the Commission for its approval or disapproval. (Emphasis added.)

93 Cong. Rec. 5, 6598 (1947).

At the Senate hearings on the bill, a colloquy had developed between a witness, Mr. Wiprud, and Senator Wheeler, the Chairman of the Committee. After the witness had called *Keogh* and *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), to the Committee's attention, Senator Wheeler responded:

> MR. REED. A threat of prosecution, I should have said, and it was started in 1942 by actual prosecution.
>
> MR. BRICKER. If the Senator will yield further, the Georgia case does not go directly in the first instance to the ratemaking power.
>
> MR. REED. No.
>
> MR. BRICKER. The Georgia case attacks the whole railroad rate system as a conspiracy against the southeastern section of the country.
>
> MR. REED. That is correct.

93 Cong. Rec. 5, 6596 (1947).

> THE CHAIRMAN. Of course, I agree with you; the law has always been if you do something in an illegal way, even though the result of it would be all right, it would still be a violation of the Sherman Antitrust Act. That is the fundamental law of the land with reference to the Sherman Antitrust Act.

Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce, 79th Cong., 2d Sess. 581 (1946) [hereinafter cited as the 1946 Senate Hearings] (testimony of Mr. Arne Wiprud, attorney).

During the same hearing, another witness, Mr. Winn, testified:

> When they were found to be in furtherance of a national transportation policy and to meet such standards and conditions as the Commission imposes, the Commission would be authorized to approve them. Approval is further conditioned on preserving reasonable opportunity for independent action by individual carrier. *To the extent that these arrangements were approved by the Commission—and only to that extent—carriers could be relieved from the restrictions of the Sherman Act.* (Emphasis added.)

1946 Senate Hearings, *supra,* at 366 (testimony of Mr. Sam Winn, Chairman, Western Conference Committee). It could not be more explicitly stated that only to the extent that the carriers' activities conformed to ICC-approved arrangements where they were to be relieved from they restrictions of the Sherman Act.

Finally, an example posed by the bill's sponsor, Senator Reed, during the 1947 hearings is instructive:

> SENATOR REED. Suppose the railroad executives should meet and determine that they should buy

> all of the steel to make their steel cheaper, and they submitted that agreement to the ICC. The ICC has no jurisdiction over steel mills, purchase of steel mills, other than its indirect influence in the way of authorizing capitalization. It would have no jurisdiction, and if the Commission did issue an approval, it would have no force or effect. That would be a direct violation of the antitrust laws or at least subject to action under the antitrust laws.
>
> I have used a violent example here, but it is the one that most readily occurs to me.

Hearings on S. 110 Before the Senate Comm. on Interstate Commerce, 80th Cong., 1st Sess. 146 (1947). As previously discussed, however, the ICC could not have approved the activities which were the subject of the present complaints. It is statutorily forbidden to permit carriers to suppress another carrier's independent rate actions. It cannot approve secretly set rates which do not comply with the Commission's prescribed notice and review requirements. Senator Reed had no hesitation in declaring that activities of this nature would be a direct violation of the antitrust laws and remain subject to action under them.

In sum, while direct references to *Keogh* are sparse and do not address directly its supplanted status, the reports, the hearings, and the debates confirm a Congressional intent that the antitrust laws shall apply to activities outside of the exemption being granted.

B. The Motor Carrier Reform Act Of 1980 Also Indicates That Congress Intended Reed-Bulwinkle To Grant Only An Express Immunity

The Motor Carrier Reform Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793 (1980), strengthens

the view that subsequent to the passage of Reed-Bulwinkle, the need for the implied immunity and the implied immunity itself both were displaced by the express antitrust exemption granted by Congress. The 1980 Report on S. 2245 by the Senate Committee on Commerce, Science, and Transportation described the situation on that date as follows:

> Under the current law [i.e., Reed-Bulwinkle] the motor carrier industry enjoys a privilege that is not accorded to other sectors of the economy. *As a result of an amendment to the Interstate Commerce Act passed in 1948,* the so-called Reed-Bulwinkle Act, the motor carrier industry has been granted immunity from the antitrust laws by the ICC in order to meet together to set uniform prices for transportation services for all competitors. (Emphasis added.)

S. Rep. No. 96-641, 96th Cong. 2d Sess. (1980), at 12. It seems clear that Congress views Reed-Bulwinkle as having granted an express exemption to the antitrust law which had the effect of displacing any prior implied immunity. As Justice Stevens put it in a recent opinion:

> Congress reacted to the *Pennsylvania Railroad* decision much as it reacted to the *South-Eastern Underwriters* decision. It decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate that policy choice.

Southern Motor Carriers Rate Conference, Inc. v. *United States,* 105 S.Ct. 1721, 1734 (1985).

Congress' 1980 statement that motor carriers obtained their existing immunity "as a result" of the

Reed-Bulwinkle legislation gives no indication of an immunity existing outside of the confines of Reed-Bulwinkle or an immunity for anticompetitive activities which the ICC has not authorized. The focus is on the fact that motor carriers enjoy a special privilege through the express immunity granted in Reed-Bulwinkle. Accordingly, there is no need for any further implicit exemption.[18]

C. This Court's Parallel Case Law Recognizes That Congress Intends Express Immunity In The Transportation Industry To Displace Previous Implied Immunity

The Court's analysis of Congressional intent articulated in *Carnation Co., supra,* 383 U.S. 213, reinforces the conclusion that in granting the express immunity of Reed-Bulwinkle, Congress necessarily was delineating the boundaries of the immunity to be granted. In *Carnation,* a unanimous Court ruled that an antitrust damage remedy exists for joint ratemaking activities which are conducted outside of the boundaries of a regulatory statute granting antitrust relief for approved agreements.[19] The Court held that:

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[18] This would appear to be the view of all three branches of the government: "[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions," *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 787. The Executive branch already has expressed its disagreement with the defendants' claim to an implied exemption.

[19] The defendant carriers argue that there are differences between the Shipping Act and the Interstate Commerce Act which justify making unapproved price fixing actionable under one statute and not under the other. Not only does the reasoning of this Court in *Carnation* apply with full force to the present unauthorized conduct, but it is clear that Congress viewed the two Acts as conferring

> The creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.

Id. at 216-217. The Court referred to its long-time recognition that the antitrust laws represent a "fundamental national economic policy" and stated:

> We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts.

Id. at 218.[20] This ruling should apply with the same force in the motor carrier transportation industry as in the ocean shipping industry.

The conclusion that *Keogh* was supplanted ever since an express immunity was made available by Congress receives further support in *ICC* v. *ATA, supra,* 104 S.Ct. 2458. While affirming the authority of the ICC

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the same limited exemption. House Report No. 1100 accompanying Reed-Bulwinkle specifically cites Section 15 of the Shipping Act as a direct precedent for granting an administrative agency authority to approve agreements between carriers which confers antitrust law relief. H.R. Rep. No. 1100, *supra,* 1948 U.S. Code Cong. & Ad. News at 1848 and 1849.

[20] Again, with reference to legislative history, the Court should contrast the importance it has ascribed to the Sherman Act as a "fundamental national economic policy" with Congress' reference in the final report on Reed-Bulwinkle characterizing the Act as applying to the "relatively limited field of transportation in interstate commerce" by ICC-regulated carriers. House Report No. 1100 at p. 1847.

to invalidate tariffs, albeit in a divided decision, the Court unanimously referred to the right of shippers by motor carrier to collect damages for antitrust law transgressions. By contrast, throughout these proceedings, the defendant truckers have insisted that *Keogh* states a "filed rate doctrine" which immunizes *all* activities encompassed within plaintiffs' complaint irrespective of whether they represent (1) ratemaking inconsistent with their approved ratemaking agreement, or (2) agreements not to file lower rates, or (3) activities to suppress offers of competitive rates through the filing of single carrier tariffs. If the truckers are correct in their interpretation of *Keogh,* then the Court was incorrect in *ICC* v. *ATA* at 2462 where it referred to the ability of carriers to collect compensatory damages under the antitrust laws.

IV. In Subsequent Decisions The Court Has Rejected Or Discarded The Principal Points Of The Rationale It Used In Formulating The *Keogh* Result

Not only has the express immunity provided in Reed-Bulwinkle displaced the need for the implied immunity granted by the Court in *Keogh,* but the Court subsequently has discarded much if not all of the reasoning it employed in *Keogh.* The Court of Appeals identified four key elements which the Court relied on to support the result it reached. They are (1) that since the rate published under a tariff is the "legal" rate between the carrier and the shipper, a damage award could be construed as a discriminatory rebate; (2) that a calculation of damages based on rates which would have prevailed but for the conspiracy would involve speculation and difficulties of proof; (3) that shippers may not have suffered injury if they passed on the illegal

overcharges to their customers; and (4) that the "legal" rate which carriers must charge is the rate on file with the ICC. After analyzing these four underpinnings of *Keogh*'s implied immunity doctrine, the Court of Appeals concluded that none are valid today.

A. The Possibility That Damage Awards Would Be Equivalent To A Rebate Is Inconsistent With Subsequent Holdings Of The Court And In Any Event Would Not Apply In A Class Action Recovery Suit

Damage awards are not rebates. The Court of Appeals discussed the difference between a secret rebate—a carrier's passing money under the table to a favored shipper—and damages awarded pursuant to a judicial decision that a shipper has suffered antitrust injury. The opinion reiterated this Court's observation in *Carnation, supra,* 383 U.S. at 219, n.3:

> There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.

The Court of Appeals observed that refusal to grant damages to injured shippers for fear that the awards would be discriminatory would be inconsistent with the Court's decision in *ICC* v. *ATA, supra.* In that case the Court commented that when the ICC finds an effective tariff unlawful, injured parties can recover damages under Section 11705(b)(3) *and* whatever additional amounts the antitrust laws allow.[21]

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[21] For a variety of reasons, the only overcharge recovery which shippers are likely to obtain in broad conspiracies such as the one now before the Court are those flowing from an antitrust damage action. First, the ICC which through budgetary restraints is struggling to review even a tiny fraction of the tariff filings it receives would find it difficult or impossible to adjudicate the validity of the numerous tariffs which are filed in connection with a regional or national conspiracy. Second, statute of limitations problems (see Section I, *supra*) may serve to prevent recovery. Third, only the possibility of classwide relief is likely to justify the expense of seeking recovery. Thus, while the plaintiffs in antitrust damage actions almost never receive treble damages to which there is theoretical entitlement, they stand a chance of recovering at least actual damages through instigation of an antitrust damage suit.

The Court of Appeals also correctly recognized that any concern about discriminatory rebates is "scarcely applicable" to suits seeking recovery of overcharges on behalf of a class of injured shippers.[22]

Perhaps most importantly, a tortfeasor's argument that it should not be asked to make restitution to its victims who actively seek compensation because this would be unfair to unrecompensed victims should be rejected as senseless. The justification for this contention depends upon the presumption that the wrongdoing affected so many shippers and so many tariffs as to require that illegal profits be left in the hands of the wrongdoer because of alleged complexities in the compensation process.

B. Determining Damages Presents No Extraordinary Problem

Determination of damages will depend upon proving the lower rates which would have prevailed absent the conspiracy. The contention that such rates may be difficult to ascertain was characterized by Judge Friendly

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[22] The same observation was made by Judge Marshall in the *Wheat Rail Freight Antitrust Litigation,* 579 F. Supp. 517, 535 (N.D. Ill. 1984).

as "even less compelling" today than the claim that a damage award would be tantamount to a freight preference.

Proof of what the rates would have been absent the illegal conspiracy can be established by probability, and there need not be direct, positive evidence. "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931).

Motor freight rates are not so complex or unique that courts should refrain from calculating damages occasioned by the unauthorized price fixing of carriers. Any view that ICC expertise is essential to the determination of damages is undercut by reference to actual ICC procedures. *The vast majority of motor freight tariffs in fact become effective with no review whatsoever by the ICC.*[23]

In the MCA of 1980, *supra*, and the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), Congress itself endorsed the view that rates filed by carriers in open competition would be a fair measure of what trucking rates should be in a competitive market.[24] This statu-

[23] See section I C, *supra*.

[24] While it is premature to suggest the damage method which the plaintiff shippers will select for the Niagara Frontier violations, two ready reference points come to mind. Agreements reached at the secret Principals Committee to raise tariffs by a set percentage, such as five percent, provide an easy method of computation. Likewise, comparison between prices in the independent tariff filings which the defendants suppressed versus the prices which were maintained as a result of the suppression gives a readily understood measure of damages.

Defendants should be estopped from contending that had they not illegally raised prices or illegally suppressed independent tariff filings, they might nonetheless have been able to obtain higher tariffs through following approved procedures. Wrongdoers should not be given the benefit of speculation that their acts which were deliberately intended to enhance prices would have been ineffective to do so.

tory determination that there is little need for regulation over independent pricing practices in the trucking industry followed an extensive study by the Congress, and clearly refutes the assumption prevailing in 1922 that the only legal or reasonable rate was that which was approved by the ICC after a complicated review process.[25]

In fact, the award of damages for antitrust violations in regulated industries has become commonplace. *Carnation, supra*, 383 U.S. 213; *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984); *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. 773. Some of these cases involved tariffs or

[25] Even under the original Interstate Commerce Act of 1887, independent tariffs could be filed and become effective without ICC review. Interstate Commerce Act, Chap. 104, 24 Stat. 379 (1887).

pricing agreements affecting competitors rather than customers, but the damage calculations involved the selfsame issue of determining what prices would have prevailed in the absence of the conspiracy.

C. *Keogh*'s Justification That Shippers Could Not Prove Damages Because Transportation Charges Are Passed On To Customers Of The Shippers Has Been Rejected

It is not necessary to linger upon the concern in 1922 that shippers should not recover antitrust damages for illegal overcharges because they *might* have passed these damages on to their customers. This "pass on" defense effectively was eliminated by this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977) which held that the antitrust damages claim rests with the person paying the overcharge. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 491, n.8 (1968) in which the Court dismissed the *Keogh* decision's damages argument as "dictum."

D. Rates Conspiratorially Set In Contravention Of ICC Regulations Necessarily Are Illegal

In *Keogh,* the Court suggested that rates resulting from a conspiracy may not necessarily be illegal because the legality of rates is determined under provisions of the Interstate Commerce Act. It may be that at this point in the Court's analysis it was focusing on the necessity for implied immunity and that it was with reference to the ability of the ICC to approve joint rates that it characterized collectively set rates as not necessarily illegal. The better policy is that rates set in secret defiance of a regulatory plan should be

regarded as illegal. There is little purpose in giving a regulated entity which has set out to abuse its regulated status an opportunity to invoke the protection of that status once its illegal activities come to light.

Furthermore, the Court's suggestion in *Keogh* that conspiratorial conduct is not necessarily illegal is plainly inconsistent with the recognition that even prior to the passage of Reed-Bulwinkle such conduct could be enjoined either by the Department of Justice or a private party precisely because the conduct is unlawful under the Sherman Act.

The argument that even though carriers engaged in unlawful conduct in submitting a rate to the Commission for approval, the rate cannot be used for comparison purposes in computing damages has been rejected by the Court. In *Canter* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), the defendant utility, which had been sued for damages under the antitrust laws, raised a contention that it was obliged to conform to approved tariffs even if these tariffs were implemented through conduct which violated the Sherman Act. The Court, however, distinguished conduct compelled by a regulatory agency without solicitation by its regulated entities, and application by such companies for approval of tariff proposals which they formulated for their own benefit.

> We may assume, *arguendo,* that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command. Such an assumption would not decide this case, if, indeed, it would decide any actual case. For typically cases of this kind involve a blend of private and public decisionmaking. The Court has already decided that state authori-

zation, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. . . .

> The case before us also discloses a program which is the product of a decision in which both the respondent and the Commission participated. Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. . . . There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law.

Id. at 592-594.

The "legal" rates, here under attack, are rates which were the product of a forbidden conspiracy. The collusively set rates were not compelled by the ICC. Accordingly, the artificially high prices which resulted from the Commission's unwitting approval of these rates does not serve to legitimize them as competitive rates. To state it differently, the defendants' success in deceiving the Commission that their rate filings complied with the tariff bureau agreement the ICC had approved does not give them the right to retain all revenues they collected pursuant to non-complying ratemaking.

V. Since 1980 The Express Immunity Which Displaced *Keogh*'s Implied Immunity Has Been Further Limited

Petitioners' complaints allege that the defendant carriers' illegal activities continued until at least 1981. By that time, Congress had passed the Motor Carrier Reform Act of 1980, which made the express exemption to the antitrust laws granted in the Reed-Bulwinkle Act even more stringent. Although the MCA made no direct reference to *Keogh*, it is indisputable that the Act expressed Congress' aversion to anticompetitive rate setting. As the Court of Appeals noted with respect to the Congressional purpose:

> Exposing rate making to competitive forces to as great an extent as possible was among the most significant aspects of this deregulation.

Square D v. *NFTB*, Appendix to Petition for Certiorari at p. 15a (citing H.R. Rep. No. 1069, 96th Cong. 2d Sess. at 3-4 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 2283 (accompanying the MCA).

Inherent in the passage of the Act was recognition that a range of competitive rates is available and that the fact that a tariff at a high rate is on file with the ICC does not mean that other, lower and more competitive rates should not be available. If the higher rate is the product of conspiratorial non-compliance with the regulatory scheme, damages may be ascertained through comparison with rates which would have applied absent the conspiracy. The public interest in having such lower rates available—rates determined through the competitive process—was endorsed by Congress in the MCA.

The legislative history reflects this view. The legislation followed "one of the most intensive inquiries

ever conducted by the Committee on Commerce, Science, and Transportation." Senate Report No. 96-641, *supra*, at 2. The fundamental premise of the Act was a Congressional belief

> that while the marketplace is not perfect by any means, it is a better regulator of resources and services than a small group of bureaucrats in Washington, D.C.

Id. at 3. Congress was particularly critical of the rate bureau process even when that process operated in accordance with the Interstate Commerce Act and with ICC regulations.

> Over the years a system of "rate bureaus" has grown up to take advantage of this [Reed-Bulwinkle] antitrust immunity. . . .
>
> During the course of its hearings, the Committee heard a good deal of criticism of the rate bureau process. The clear advantage of the rate bureau process is that it provides a certain predictability in the rate structure and a system that shippers and truckers have learned to live with over the years. *The disadvantage is that the system inherently tends to result in rates that will be compensatory for even the least efficient motor carrier participating in the rate discussions.* When this happens, consumers lose the benefit of price competition that would occur if more efficient carriers were able to offer more attractive rates. Another serious problem has been the closed nature of the rate bureau proceedings. Voting upon specific rate proposals is done behind closed doors. In addition, many have contended that the entire process is controlled largely by rate bureau employees rather than by the carriers themselves. (Emphasis added.)

Id. at 12, 13.[38]

Finally, reverting to Justice Brandeis' concern in the *Keogh* decision that damages computations in truck or rail industry pricing conspiracies would be complex because the task of determining competitive rates involves great expertise, there is a contrary finding in the legislative history:

> The Committee has found that the evidence in the record does not support the contention of the motor carrier industry that trucking transportation is so different from all other forms of economic activity in the country that it, and it alone, should be allowed to exercise this extraordinary immunity from the antitrust laws.

Id. at 14. It is apparent that Congress believes that motor carrier rates set by truckers unimpeded by rate bureau agreements are more likely to be fair, reasonable, and economically efficient than those set through rate bureaus. This Congressional philosophy effectively overcomes the argument that damage theories based upon comparisons between independent rates and collusive rates might be flawed because they do not con-

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[38] Congress' misgivings with respect to rate bureau operation carried out in accordance with the approved rate bureau agreement surely would have been intensified with respect to illegal activities designed to go beyond the rate bureau process. If Congress was concerned about the closed nature of rate bureau proceedings and control by a limited number of bureau employees, what would have been its reaction to a secret committee of principals made up of the bureau's top management and top executives of its large member carriers?

tain an injection of the ICC expertise. In its deliberations in connection with the MCA, Congress reconfirmed that ICC intervention is not necessary to set appropriate rate levels.

CONCLUSION

Persons who abuse express exemptions to the antitrust laws are not entitled to claim the protection of an implied exemption. Recognition of an implied exemption would be inimical to the regulatory plan which has been subverted and would enable wrongdoers to retain the fruits of their illegal conduct. The Court should reverse the judgment of the Court of Appeals and hold that no implied exemption exists for conspiratorial efforts to defeat a regulatory plan.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Should this Court overrule its decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), which was reaffirmed in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), was preserved by Congress, and has been cited with approval by this Court and applied consistently by the lower courts for more than sixty years?

STATUTE INVOLVED

The Interstate Commerce Act, as amended, 49 U.S.C. § 10101 *et seq.* (1982) (formerly codified at 49 U.S.C. § 1 *et seq.* (1976)). The relevant portions of the Act are set forth in Appendices B and C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATUTE INVOLVED	i
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
A. The Complaints	1
B. The Decisions Below	3
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THIS CASE HIGHLIGHTS THE PROPER APPLICATION OF *KEOGH* AND *GEORGIA*	7
A. *Keogh* and *Georgia* prohibit judicial interference with ICA-regulated rates	7
B. *Keogh* and *Georgia* properly bar the damage claim in this case	10
II. *KEOGH* AND *GEORGIA* SHOULD NOT BE OVERRULED	14
A. As a remedy limitation, *Keogh* implements congressional intent that filed rates be governed exclusively by the Interstate Commerce Act	14
1. *Keogh* and *Georgia* are part of the long-standing filed rate doctrine, which bars judicial interference with rates subject to the ICA	14
2. The filed rate doctrine is essential to implement legislative intent	18
3. *Keogh* accommodates the congressionally-recognized interests	24

TABLE OF CONTENTS—Continued

	Page
B. The "need for" *Keogh* has not changed	27
1. The Reed-Bulwinkle Act of 1948 did not "supplant" the *Keogh* principle	27
2. The *Carnation* decision is not inconsistent with *Keogh*	30
3. The Motor Carrier Act of 1980 did not change the scheme of rate regulation, but served to create an administrative remedy for rate bureau violations that is consistent with *Keogh*	32
C. There are no procedural devices that can replace *Keogh*	35
III. IF THE LAW IS TO BE CHANGED, CONGRESS IS THE APPROPRIATE BODY TO CONSIDER THE POLICY ARGUMENTS ADVANCED HERE	44
CONCLUSION	48
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	14a

TABLE OF AUTHORITIES

CASES

	Page
American Trucking Associations v. Atchison, Topeka & Santa Fe Railway, 387 U.S. 397 (1967)	19
Anchor Coal Co. v. United States, 25 F.2d 462 (S.D.W. Va. 1928)	21
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	14, 18, 36
Arrow Transportation Co. v. Southern Railway, 372 U.S. 658 (1963)	14, 15, 16, 17, 18, 24, 37
Asbury Graphite, Inc. v. Dehyco Co., 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980)	10
Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800 (1973)	16, 39
Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad, 233 U.S. 479 (1914)	40
Bankamerica Corp. v. United States, 462 U.S. 122 (1983)	38, 47
Board of Trade v. ICC, 646 F.2d 1187 (7th Cir. 1981)	10
Board of Trade v. United States, 314 U.S. 534 (1942)	39
Burlington Northern Inc. v. United States, 459 U.S. 131 (1982)	15-16, 17, 38, 41
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	30-32
Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	16
Consolidated Rail Corp. v. National Association of Recycling Industries, 449 U.S. 609 (1981)	16
Dayton-Goose Creek Railway v. United States, 263 U.S. 456 (1924)	21
Essential Communications Systems, Inc. v. A.T. & T., 610 F.2d 1114 (3d Cir. 1979)	40
Flood v. Kuhn, 407 U.S. 258 (1972)	45
Georgia v. Pennsylvania Railroad, 324 U.S. 439 (1945)	*passim*
Gordon v. New York Stock Exchange, 422 U.S. 659 (1975)	44
Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)	10

TABLE OF AUTHORITIES—Continued

	Page
Houston, East & West Texas Railway v. United States, 234 U.S. 342 (1914)	19
ICC v. American Trucking Associations, 104 S. Ct. 2458 (1984)	*passim*
Kansas City Southern Railway v. C.H. Albers Commission Co., 223 U.S. 573 (1912)	20
Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922)	*passim*
Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516 (1939)	20
Lower Lake Erie Iron Ore Antitrust Litigation, In re, MDL 587, slip op. (E.D. Pa. June 5, 1985)	10, 26, 40
Luckenbach Steamship Co. v. United States, 179 F. Supp. 605 (D. Del. 1959), *aff'd in relevant part per curiam*, 364 U.S. 280 (1960)	42
McLain v. Real Estate Board, 444 U.S. 232 (1980)	7, 10, 12
Minsky v. Auto Driveaway, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984)	10, 26
Mitchell Coal & Coke Co. v. Pennsylvania Railroad, 230 U.S. 247 (1913)	37
Mohasco Industries, Inc. v. Acme Fast Freight, Inc., 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974)	15
Monticello Heights, Inc. v. Morgan Drive Away, Inc., 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D. N.Y. 1974)	10, 26
National Classification Committee v. United States, 746 F.2d 886 (D.C. Cir. 1984)	38, 42
New Orleans & Lower Coast Railroad v. International Proteins Corp., 514 F. Supp. 46 (E.D. La. 1981)	39
Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)	10, 43
Patsy v. Board of Regents, 457 U.S. 496 (1982)	46-47
Pinney Dock & Transport Co. v. Penn Central Corp., 600 F. Supp. 859 (N.D. Ohio 1984), *appeal docketed*, Nos. 84-3653 and 84-3654 (6th Cir. May 21, 1984)	40

TABLE OF AUTHORITIES—Continued

	Page
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	10
Robinson v. Baltimore & Ohio Railroad, 222 U.S. 506 (1912)	20
Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721 (1985)	45
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 596 F. Supp. 153 (W.D.N.Y. 1984), *issue aff'd*, 760 F.2d 1347 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 57 (1985)	*passim*
T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959)	15, 16, 17, 18, 36, 37
Terminal Warehouse Co. v. Pennsylvania Railroad, 297 U.S. 500 (1936)	9, 15, 42
Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	14, 15, 16, 37, 44
Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway, 270 U.S. 266 (1926)	21
United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945)	26
United States v. Associated Transport, Inc., 505 F.2d 366 (D.C. Cir. 1974)	38
United States v. Association of American Railroads, 4 F.R.D. 510 (D. Neb. 1945)	27
United States v. Auto Driveaway Co., 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981)	26
United States v. Bessemer & Lake Erie Railroad, 717 F.2d 593 (D.C. Cir. 1983)	26
United States v. Braverman, 373 U.S. 405 (1963)	19
United States v. Central Truck Lines, Inc., 548 F.2d 523 (5th Cir. 1977)	33
United States v. Civil Aeronautics Board, 511 F.2d 1315 (D.C. Cir. 1975)	47
United States v. Container Corporation of America, 393 U.S. 333 (1969)	25
United States v. Garner, 236 F. Supp. 632 (E.D.N.C. 1964)	37
United States v. Morgan Drive Away, Inc., 1974-1 Trade Cas. (CCH) ¶ 74,888 (D.D.C. 1974)	26

TABLE OF AUTHORITIES—Continued

	Page
United States v. Niagara Frontier Tariff Bureau, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D. N.Y. 1984)	26
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	10, 43
United States v. Radio Corporation of America, 358 U.S. 334 (1959)	10
United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973)	16
United States v. Trenton Potteries Co., 273 U.S. 392 (1927)	26
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	25, 43
United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932)	10
Westinghouse Electric Corp. v. United States, 388 F. Supp. 1309 (W.D. Pa. 1975)	39
Wheat Rail Freight Rate Antitrust Litigation, In re, 579 F. Supp. 517 (N.D. Ill. 1984), *aff'd*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert filed sub nom. Little Crow Milling Co. v. Baltimore & Ohio Railroad*, 54 U.S.L.W. 3085 (U.S. July 16, 1985) (No. 85-112)	10, 12, 40-41, 42

STATUTES AND REGULATIONS

Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887)	18
Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102	44
Elkins Act, ch. 708, 32 Stat. 847 (1903)	18
Hepburn Act, ch. 3591, 34 Stat. 584 (1906)	8, 18
Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011	44
Interstate Commerce Act	
49 U.S.C. § 6(7) (1976)	8
49 U.S.C. § 317(b) (1976)	8
49 U.S.C. § 10101(a)(1) (1982)	22, 23, 38

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. § 10701 (1982)	19, 33, 34
49 U.S.C. § 10704 (1982)	19, 25, 33
49 U.S.C. § 10706 (1982)	3, 46
49 U.S.C. § 10708 (1982)	19, 33
49 U.S.C. § 10741 (1982)	19
49 U.S.C. § 10761 (1982)	8, 20
49 U.S.C. § 10762 (1982)	20
49 U.S.C. § 11701 (1982)	25
49 U.S.C. § 11705(b)-(c) (1982)	19
49 U.S.C. § 11706 (1982)	40
49 U.S.C. § 11903 (1982)	20
Motor Carrier Act of 1935, ch. 498, 49 Stat. 543	8, 18
Motor Carrier Act of 1965, Pub. L. No. 89-170, 79 Stat. 648	15, 19
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793	19, 32-35, 44, 46
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31	32, 44
Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948)	19, 27-30
Sherman Act, 15 U.S.C. § 1 (1982)	3, 26
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895	32, 44
Transportation Act of 1920, ch. 91, 41 Stat. 456	18, 21
Transportation Act of 1940, ch. 722, 54 Stat. 898	19, 22
Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568	19
15 U.S.C. § 15 (1982)	8
49 C.F.R. § 1139 (1984)	33

LEGISLATIVE MATERIALS

58 Cong. Rec. (1919)	21
Confirmation Hearing on William F. Baxter, Nominee, to be Assistant Attorney General—Antitrust Division, Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)	43
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TABLE OF AUTHORITIES—Continued

	Page
Oversight of Freight Rate Competition in the Motor Carrier Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 1st and 2d Sess. (1977-78)	23
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H.R. Rep. No. 591, 59th Cong., 1st Sess. (1906)	21
H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844	29-30
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S. Rep. No. 433, 76th Cong., 1st Sess. (1939)	23
S. Rep. No. 44, 80th Cong., 1st Sess. (1947)	22, 27, 29-30
S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Ad. News 3108	31
ADMINISTRATIVE MATERIALS	
A.J. Poor Grain Co. v. Chicago, Burlington & Quincy Railway, 12 I.C.C. 418 (1907)	20
Alcoholic Liquors from Ohio, Indiana, and Kentucky to St. Louis, 49 M.C.C. 703 (1949)	24, 33
Anadarko Cotton Oil Co. v. Atchison, Topeka & Santa Fe Railway, 20 I.C.C. 43 (1910)	40
Cancellation of Intermediate Routing, Michigan Northern Railway, 365 I.C.C. 51 (1981)	41
Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (1962)	42
Carla Ticket Service, Inc., Broker Application, 91 M.C.C. 721 (1962), *rev'd on other grounds*, 94 M.C.C. 579 (1964)	22

TABLE OF AUTHORITIES—Continued

	Page
Expansion of Zone of Reasonableness, 367 I.C.C. 907 (1984)	33
Foodstuffs, from Florida to Ohio, 355 I.C.C. 773 (1977)	24, 33
General Increase, April 1978, S.M.C.R.C., 361 I.C.C. 1 (1978)	33
General Increase, December 1975, N.F.T.B., Investigation and Suspension Docket No. M-28866	11
General Increase, July 1974, Niagara Frontier Tariff Bureau, Investigation and Suspension Docket No. M-27823	11
General Increase, Middle Atlantic and New England Territories, 332 I.C.C. 820 (1969)	33
General Increase, N.F.T.B., U.S./Canada, April 6, 1981, Investigation and Suspension Docket No. M-30308	11
General Increase, New England Motor Rate Bureau, April 1985, ICC Docket No. 39952 (Mar. 27, 1985)	33
ICC Suspension and Fourth Section Board Case Nos. 60260, 61861, 63323, 64468, 65561, 66350, 67251, 68980, 69476, 69868, 70142, 70429, 70554, 70749, 70912	11
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Increased Rates and Charges, N.F.T.B., U.S.A.-Canada, April 1978, ICC Docket No. 36884, *remanded sub nom National Small Shipments Traffic Conference, Inc. v. ICC*, 737 F.2d 1206 (D.C. Cir. 1984)	11
Increased Rates and Charges, N.F.T.B., U.S.A.-Canada, October 1978, ICC Docket No. 37040	11
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Pacific Paper Products, Inc. v. Garrett Freight Lines, Inc., 351 I.C.C. 309 (1975)	42
Paper Articles Ratings, Illinois Freight Association, 10 M.C.C. 329 (1938)	24, 33

TABLE OF AUTHORITIES—Continued

	Page
Petroleum Between Washington, Oregon, Idaho, and Montana, 234 I.C.C. 609 (1939), *aff'd sub nom. Scandrett v. United States*, 32 F. Supp. 995 (D. Or. 1940), *aff'd mem.*, 312 U.S. 661 (1941)	21
Rockne Bros.—Commodities Between Sioux City, Iowa, and South Dakota, 19 M.C.C. 739 (1939)	23-24, 33
Transit on Wheat Between Reshipping Point and Destination, 365 I.C.C. 890 (1982)	12
United States v. Consolidated Freightways Corp., 350 I.C.C. 1 (1974)	33
United States v. Mercury Motor Express, Inc., 355 I.C.C. 460 (1976)	33
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MISCELLANEOUS

Reply Brief for the Petitioners, *ICC v. American Trucking Associations*, 104 S. Ct. 2458 (1984)	35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP., *Petitioners*,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

COUNTERSTATEMENT OF THE CASE

A. The Complaints

Two shippers initiated these consolidated antitrust complaints to challenge rates they paid for truck transportation under Interstate Commerce Commission ("ICC") tariffs.[1] The defendants are the Niagara Frontier Tariff Bureau, Inc. ("NFTB"), an ICC-approved collective ratemaking organization, and five Canadian motor carriers who hold operating certificates from the ICC and Canadian regulatory authorities, and who are members of the NFTB.[2]

[1] The plaintiffs will be referred to as Petitioners. The complaints are reproduced in the Joint Appendix ("JA") and will be referred to as the "Square D Complaint" and the "Big D Complaint." Petitioners' Brief will be referred to as "Pet. Brief."

[2] The defendant motor carriers are Bondy Cartage, Ltd., Dominion-Consolidated Truck Lines Ltd., ICL International Car-

Both complaints claim antitrust injury and treble damages on the theory that Respondents' filed rates were excessive, that Petitioners were entitled to lower rates than those Respondents charged based on published tariffs, and that Petitioners' damages are the difference between those hypothetical lower rates and the filed rates they paid.[3] Petitioners seek to toll the statute of limitations in order to claim damages for a sixteen-year period from 1966 into 1981. JA 13, 26.

As Petitioners acknowledge, the rates charged by the Respondent motor carriers were regulated under the Interstate Commerce Act ("ICA"). JA 9, 21. The Act required that the challenged rates be filed with the ICC in published tariffs, not be changed except upon thirty days advance notice, and be "just and reasonable." JA 9, 22. There is no dispute that the rates upon which these treble damage claims are predicated were at all relevant times duly filed under the ICA, and were never set aside, disapproved or nullified by the Commission. Moreover, Petitioners never challenged Respondents' rates or ratemaking before the ICC, or otherwise sought damages or other relief available to shippers under the Interstate Commerce Act.[4]

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riers, Ltd., Inter-City Truck Lines (CANADA), Inc., and TNT Canada, Inc. The defendants will be referred to as Respondents. The information required by Rule 28.1 is set forth in Appendix A to Respondents' Joint Brief In Opposition, as modified by Appendix A to this brief.

[3] Thus, the Square D Complaint alleges that shippers "paid more for motor freight transport . . . than they would have paid in a freely competitive market." JA 13. The Big D Complaint similarly alleges that transportation rates were fixed "at artificial and non-competitive levels" and that shippers "paid substantially higher charges for the carriage of cargo than they would have paid [otherwise]." JA 25-26. *See also* Pet. Brief at 36-37 n.24 (using hypothetical lower rates to calculate the allegedly excessive charge).

[4] Petitioners' substantive allegation is that certain aspects of Respondents' collective ratemaking in the period 1966 to 1981 fell outside the antitrust immunity provided by the Interstate Commerce Act, 49 U.S.C. § 10706 (1982), and therefore amounted to illegal price-fixing under the Sherman Act, 15 U.S.C. § 1 (1982). The complaints allege that Respondents' ratemaking "was not or could not be approved by the ICC" because it did not comport with the "terms of the NFTB agreement" and ICC procedures and it "interfered with" the right of "independent action" protected by the Interstate Commerce Act. Square D Complaint, JA 11-12; Big D Complaint, JA 24-25. Neither complaint alleges that the violation of ICC procedures was "knowing" or "willful," or that the subject matter of the violations was in any respect beyond the jurisdiction of the ICC to consider and remedy.

B. The Decisions Below

This case arises out of the dismissal of Petitioners' damage claims under *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), which hold that Congress intended the comprehensive scheme of shipper rights and remedies in the Interstate Commerce Act to be exclusive where injury and damage are predicated upon regulated rates. In dismissing these claims, the district court recognized that the instant case "essentially focuses on what plaintiffs claim are unjust and excessive rates," and held that "rate determinations are a matter for the ICC and not for the court." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153, 155-56 (W.D.N.Y. 1984), Petition Appendix ("Pet. App.") at 49a.

The Second Circuit affirmed without dissent. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), Pet. App. 1a. Writing for the court, Judge Friendly could find no basis for Petitioners' contention that the *Keogh* line of authority had been overruled by any subsequent statutory change or decision of this Court. To the contrary, the Second Circuit found that *Keogh* had been reaffirmed by this Court, consistently applied by the lower courts, and preserved by

Congress, and consequently held that *Keogh* remains good law today. *Id.* at 1356-64, Pet. App. at 19a-36a.

The Second Circuit further recognized that, contrary to Petitioners' repeated characterizations here, *Keogh* does not establish a "blanket" antitrust immunity, but precludes only antitrust damage claims that flow directly from rates subject to the ICA's powers and remedies. *Id.* at 1365-66, Pet. App. at 38a-40a. The rationale is simple: only a claim for damages would require a court to substitute its judgment for the ICC's on the appropriate level of rates and to apply civil sanctions that supersede the plenary authority of the Commission. On the other hand, where the nature of the remedy sought does not require judicial oversight of ICC-regulated rates, *Keogh* does not govern. For this reason, the United States may proceed by way of criminal prosecutions as well as injunction actions directed at the underlying conduct, and shippers may pursue damage claims that do not involve filed rates. Thus, the Second Circuit remanded this case for consideration of possible damage and injunction claims not foreclosed by *Keogh* and the ICA. *Id.*[5]

SUMMARY OF ARGUMENT

Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922), holds that shippers may not use the antitrust laws to attack collaterally rates subject to regulation under the Interstate Commerce Act. A shipper who pays the filed rate, which is the only legal rate under the ICA, and who enjoys the unique statutory protection to assure that such rate is fair and reasonable, does not suffer cognizable antitrust injury. *Id.* at 163. That principle was reaffirmed two decades later in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), and held

[5] Petitioners have indicated in subsequent proceedings before the district court that, even if the lower court determinations are upheld, they intend to plead non-*Keogh* damage claims and to seek an injunction upon any remand.

to foreclose an antitrust attack on rates produced by collective ratemaking that, as alleged here, was unapproved, coercive, and outside an express antitrust immunity.

Congress intended the comprehensive scheme of rate regulation in the Interstate Commerce Act to be exclusive. Extra-statutory remedies that affect rates would undermine the basic purposes of the Act and the Commission's ability to regulate transportation charges. Thus, *Keogh* and *Georgia* restrict one antitrust *remedy* to avoid judicial interference with the ICA; those cases do not, contrary to the repeated mischaracterization by Petitioners, immunize any *conduct*, for illegal collective ratemaking remains fully subject to the Justice Department's criminal and civil antitrust enforcement powers. Moreover, shippers are free to challenge excessive rates and rate bureau violations under the ICA, and the Commission possesses potent tools both for controlling excessive charges and for punishing rate bureau infractions. *See ICC v. American Trucking Associations*, 104 S. Ct. 2458 (1984) (*"ATA"*). Thus *Keogh* and *Georgia* reflect a necessary and appropriate accommodation of the ICA rate regulation scheme and the antitrust laws, based entirely on the intent of Congress.

Keogh and *Georgia* have been cited with approval by this Court and consistently applied by the lower courts to bar shipper claims such as this one; they unquestionably govern this case. Nonetheless, Petitioners and the Government urge this Court to overrule itself,[6] not on the basis that Congress has in any relevant way altered the historic scheme of rate regulation in the ICA, but on what can at best be characterized as policy proposals. In

[6] The Brief for the United States as Amicus Curiae Supporting Petitioners ("U.S. Brief") urges this result explicitly; the Petitioners, implicitly. U.S. Brief at 21, 27.

projecting their view of appropriate regulatory policy, Petitioners and the Government ignore this Court's "filed rate" decisions, of which *Keogh* and *Georgia* are an integral part, and the unique considerations underlying that longstanding doctrine. They also ignore the drastic ramifications for congressional policy and judicial administration that would result from overruling *Keogh*.

When Congress enacted the Interstate Commerce Act, it established a scheme of regulatory control over rates that is in fundamental ways antithetical to free market pricing. In return for the certainty and stability of rate regulation under the ICA, shippers and carriers alike have had to surrender the advantages each could have claimed in a "freely competitive market." They have also relied on the ICA, which Congress established as the sole determinant of rate lawfulness. After sixty years of judicial protection of this scheme, it would be manifestly unfair for this Court to reverse course now and grant shippers a retroactive entitlement to the best of both worlds—not only the fair and reasonable rates guaranteed by the ICA, but the still lower rates that might have existed if transportation rates were not regulated by statute. If the historic accommodation between the Interstate Commerce Act and the antitrust laws is to be readjusted, that is a task for Congress.

ARGUMENT

I. THIS CASE HIGHLIGHTS THE PROPER APPLICATION OF *KEOGH* AND *GEORGIA*.

A. *Keogh* and *Georgia* prohibit judicial interference with ICA-regulated rates.

The issue in *Keogh* was whether an antitrust damage remedy is available to a shipper who has paid the legal rate pursuant to the Interstate Commerce Act. The plaintiff, having unsuccessfully challenged rates under the ICA, argued that his rights were not limited to "the protection against unreasonably high or discriminatory rates afforded him by the [ICA]," but that the Sherman Act entitled him to the benefit of "competitive" rates, "still lower, which, but for the conspiracy, he would have enjoyed." *Keogh*, 260 U.S. at 161-62. The Court unanimously rejected this theory, holding that injury and damages caused by the filed rates of common carriers are not legally cognizable under the antitrust laws. *Id.* at 163. *See also McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) (characterizing *Keogh*).

The Court's holding was based on the fact that Congress intended the legality of filed rates to be determined solely by the ICA. Under the statutory scheme, "[t]he legal rights of shipper as against carrier *in respect to a rate* are measured by the published tariff." 260 U.S. at 163 (emphasis added). Regardless of how the rate was produced, whether by independent or collective action, whether before or after Commission approval, the filed rate is the only legal rate:

> Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate, as between carrier and shipper. *The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.*

Id. (emphasis added).[7] The Court therefore concluded that shippers who have paid the filed rates as a matter

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[7] Congress was unequivocal that no carrier may "charge . . . a greater or less or different compensation . . . than the rates . . .

of law have not been "injured" within the meaning of the antitrust laws. *Id.* *See* 15 U.S.C. § 15 (1982) (standing to claim antitrust damages granted to anyone "injured in his business or property").

Beyond the irreducible bar to antitrust standing, the Court was concerned about the threat to the system of rate regulation that the antitrust damage remedy would entail. Rate lawfulness must be determined solely under the ICA, to the exclusion of "the several juries and courts" reaching conflicting results, because "otherwise the paramount purpose of Congress [in the ICA]—prevention of unjust discrimination—might be defeated." 260 U.S. at 163-64. A further "obstacle" was that the plaintiff's measure of damages required proof, not simply of a hypothetical lower rate, but of a lower rate that would pass muster under the ICA. *Id.* at 164. Stressing that it is only the Commission that can make this determination, the Court rejected as impossibly speculative prior referral of the "hypothetical rate" issues to the Commission, and upheld dismissal of the complaint. *Id.*

Thus, Petitioners misconstrue *Keogh* when they state that it represents a "blanket immunity" designed to shield price-fixing agreements from the antitrust laws, Pet. Brief at 25, or that the Court assumed that "joint ratemaking" was in any sense "lawful." *Id.* at 10. To the contrary, the Court acknowledged that such conduct was illegal and remained fully subject to criminal and civil prosecution by the government under the antitrust laws. 260 U.S. at 161-62.[8] It was not the underlying con-

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specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates . . . so specified . . . ." Ch. 3591, § 2, 34 Stat. 584, 587 (1906) (codified at 49 U.S.C. § 6(7) (1976); recodified at 49 U.S.C. § 10761 (1982)). *See also* Ch. 498, § 217(b), 49 Stat. 543, 561 (1935) (codified at 49 U.S.C. § 317(b) (1976)) (identical language applicable to motor carriers).

[8] The Government's contrary view, U.S. Brief at 8 n.9, is belied by the *Keogh* Court's conclusion that the illegality of collective ratemaking under the Sherman Act was already "settled." 260 U.S. at 161-62.

duct, but the nullifying impact the antitrust damage remedy would have on filed rates, that was at issue.

The *Keogh* holding was reaffirmed twenty-three years later in *Georgia*, 324 U.S. at 453.[9] There, the State of Georgia sued in part as a shipper for antitrust damages and injunctive relief based upon a conspiracy among the defendant railroads to charge excessive and discriminatory rates. The allegations differed from *Keogh* in two respects: first, the challenged rates had *not* been approved (or disapproved) by the Commission,[10] and second, those rates were the alleged result of coercion that had restrained independent action. 324 U.S. at 444-45. Nevertheless, upon review of *Keogh*'s reasoning, the Court held that, "from the *Keogh* case alone . . . Georgia may not recover damages even if the conspiracy alleged were shown to exist." *Id.* at 453.

In addition, the Court drew a sharp distinction between injunctive relief directed against the underlying conspiracy and the same relief aimed at the rates that were the product of the conspiracy. As to the former, an injunction would lie against the conspiracy because the Commission then had no regulatory powers over rate agreements; but as to the rates themselves, where the Commission's authority was plenary, the Court barred any form of equitable relief. *Id.* at 454-55. Thus, *Georgia* reinforces the essential nature of *Keogh* as a remedy limitation, not an antitrust immunity.

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[9] *Keogh* was applied in the intervening years in *Terminal Warehouse Co. v. Pennsylvania Railroad*, 297 U.S. 500 (1936). The Court cited *Keogh* as "apposite" support for the proposition that, with one exception not relevant here, the exclusive remedy for claimed discriminatory charges lay in the ICA, not the Sherman Act. *Id.* at 511. The exception covered a conspiracy among carriers to aid the unregulated monopoly of a manufacturer or group of manufacturers, where "the damages [were] being measured not merely by the consequences flowing from the preference [the filed rate], but by those flowing from the conspiracy in all its comprehensive unity." *Id.* at 516.

[10] *See* 324 U.S. at 452, 460 *and Square D*, 760 F.2d at 1356, Pet. App. at 17a.

The principle established in *Keogh* and reaffirmed in *Georgia* has been uniformly applied by the lower courts to bar shipper damages for antitrust claims based on filed rates. The unbroken line of authority includes the Second Circuit's opinion below and three recent decisions by the Seventh Circuit. *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co. v. Baltimore & Ohio Railroad*, 54 U.S.L.W. 3085 (U.S. July 16, 1985) (No. 85-112) [hereinafter cited as "*Wheat Rail*"]; *Minsky v. Auto Driveaway*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984); *Board of Trade v. ICC*, 646 F.2d 1187 (7th Cir. 1981). In addition, three district courts—from the Third, Ninth and Second Circuits—have applied the doctrine. *In re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587, slip op. (E.D. Pa. June 5, 1985), *reprinted in* Respondents' Joint Brief in Opposition, Appendix B at 2a [hereinafter cited as "*Iron Ore*"]; *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974). Moreover, the *Keogh* rule has been frequently cited with approval by this Court.[11]

B. *Keogh* and *Georgia* properly bar the damage claim in this case.

Keogh and *Georgia* squarely control this case, as both the district court and the Second Circuit held. Peti-

[11] *E.g.*, *McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) (citing *Keogh* for the proposition that inability to prove "legally cognizable damages" limits relief available in an antitrust action); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 & n.12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 & nn.28 & 29 (1963) (citing *Keogh* as a case in which "plain repugnancy between the antitrust and regulatory provisions" had been found); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); *United States v. Radio Corporation of America*, 358 U.S. 334, 347-48 (1959); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 483, 485 (1932).

tioners, like the plaintiff in *Keogh*, paid rates contained in published tariffs and subject to ICA standards—rates that, once effective, were never set aside, disapproved, or nullified as unlawful. Petitioners thus received exactly what they were entitled to under the ICA—rates governed by the statutory standards of the Act. In fact, during much of this period, the Commission actively reviewed the rate increases at issue in this case *before* they went into effect to enforce compliance with the Act.[12]

Not satisfied with the "fair" rates guaranteed them by the ICA, Petitioners seek from the courts what amounts to a retroactive award of competitive rates. Their complaints request damages based, not on the filed and regulated rates, but, just as in *Keogh*, on such lower rates as might have prevailed in a "freely competitive market."

[12] Although neither necessary to, nor considered in, the decisions below, the Commission's docket shows that, from January 1974 through December 1982, the NFTB filed 20 general rate increases on behalf of its members, including Respondents. All were reviewed by the ICC before they became effective. In fifteen cases, the Commission permitted the increases to take effect as proposed. *See* ICC Suspension and Fourth Section Board Case Nos. 60260, 61861, 63323, 64468, 65561, 66350, 67251, 68980, 69476, 69868, 70142, 70429, 70554, 70749, and 70912. In three cases the ICC permitted lesser increases than those proposed to take effect. *General Increase, July 1974, Niagara Frontier Tariff Bureau*, Investigation and Suspension Docket No. M-27823; *General Increase, December 1975, N.F.T.B.*, Investigation and Suspension Docket No. M-28866; *General Increase, N.F.T.B., U.S./Canada, April 6, 1981*, Investigation and Suspension Docket No. M-30308. Of the two cases in which the agency conducted formal investigations, one found the increased rates to be just, reasonable and otherwise lawful. *Increased Rates and Charges, N.F.T.B., U.S.A.-Canada, October 1978*, ICC Docket No. 37040, order of March 14, 1979 (unpublished). The other remains pending before the ICC. *Increased Rates and Charges, N.F.T.B., U.S.A.-Canada, April 1978*, ICC Docket No. 36884, *remanded sub nom. National Small Shipments Traffic Conference, Inc. v. ICC*, 737 F.2d 1206 (D.C. Cir. 1984). These general increases are precisely those on which Petitioners propose to base their damage calculations. *See* Pet. Brief at 36-37 & n.24.

Square D Complaint, JA 13. It is precisely this claim that *Keogh* holds is not, and cannot be, "legally cognizable" under the antitrust laws, *McLain*, 444 U.S. at 243 (citing *Keogh*), because the filed rates Petitioners paid, having never been "suspended or set aside" by the ICC, are "for all purposes, the legal rate." *Keogh*, 260 U.S. at 163.[13] It is not a freely competitive market rate to which Petitioners are entitled under the ICA, but the "just and reasonable" filed rate.[14]

Apart from the fact that Petitioners have suffered no legal injury, their damage claim, like the one in *Keogh*, would embroil the courts in the resolution of issues that Congress delegated solely to the expert agency. As a matter of proximate cause, Petitioners could not establish legal injury or damage without proof that any hypothetical lower rate conformed to the requirements of the ICA. *Keogh*, 260 U.S. at 163-64. As *Keogh* recognized,

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[13] As the Commission itself has made clear, an otherwise lawful rate—one that is reasonable and non-discriminatory—does not automatically become a substantively unlawful rate, or the basis of legally cognizable damages, simply because it may be the product of an infraction of rate bureau procedures. *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890, 898-901 (1982). Moreover, the Commission's discretion to make that determination was specifically cited with approval by this Court in *ICC v. American Trucking Associations*, 104 S. Ct. 2458, 2468 n.13 (1984) (*"ATA"*).

[14] Petitioners miss the point in arguing that Respondents should be somehow estopped from showing, as a *factual* matter, that no injury can be established because the same rates could have been agreed upon collectively if rate bureau procedures were followed. Pet. Brief at 36-37 n.24. The bar to their damage claim is one of law, not fact. In addition, however, the courts may not estop a defense—that the same rates would have been produced by procedurally-correct ratemaking—for which there is an express statutory immunity. *Cf. In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517, 535-36 (N.D. Ill. 1984) (recognizing that, if the carriers had abided by the rate bureau agreement, the same rates could have been agreed on and filed), *aff'd, supra* p. 10.

such a determination may require "reconstituting the whole rate structure," a task for the Commission, not the courts. *Id.* at 164.

In an attempt to avoid *Keogh* and *Georgia*, Petitioners argue that their allegations of "unauthorized" conduct are a "far cry" from the situation in *Keogh*, but in so doing distort the holding of those cases. Pet. Brief at 10-11. Neither *Keogh* nor *Georgia* turned on the nature of the underlying conduct, because both decisions recognized that collective ratemaking was then unlawful under the Sherman Act and was fully subject to punishment and redress through government prosecution. *Keogh*, 260 U.S. at 161-62; *Georgia*, 324 U.S. at 458. Indeed, the *Georgia* case, which Petitioners ignore, reaffirmed the *Keogh* rule, *see Square D*, 760 F.2d at 1356, Pet. App. at 17a, and applied it in precisely the circumstances relied on here, namely collective ratemaking alleged to be unapproved by the ICC, to be "coercive" and to be outside an express antitrust immunity.[15] 324 U.S. at 444-45. In short, the fundamental concern in both cases was to protect the integrity of regulated rates, as it is judicial interference with rates, not conduct, that *Keogh* and *Georgia* bar.

Accordingly, the applicability of *Keogh* and *Georgia* to the facts of this case is clear, and Petitioners may proceed only by convincing this Court to overrule these long-standing precedents.

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[15] Under statutory wartime powers, certain activities of railroad rate bureaus had been exempted from the antitrust laws. The Court in *Georgia* noted the existence of this express immunity, but held that it was inapplicable because, *inter alia*, "[i]t [did] not sanction the use of coercion." 324 U.S. at 459 n.7.

II. *KEOGH* AND *GEORGIA* SHOULD NOT BE OVERRULED.

A. As a remedy limitation, *Keogh* implements congressional intent that filed rates be governed exclusively by the Interstate Commerce Act.

1. Keogh *and* Georgia *are part of the longstanding filed rate doctrine, which bars judicial interference with rates subject to the ICA.*

A fundamental flaw in the arguments advanced by Petitioners and the Government, and in the commentary of the court below, is the treatment of *Keogh* as an isolated event based upon static logic, rather than as an integral part of the longstanding "filed rate" doctrine.[16] That doctrine "has its origins in this Court's cases interpreting the Interstate Commerce Act, . . . and has been extended across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (citations omitted). *Keogh* and *Georgia* stand as part of this jurisprudence, which "forbid[s] judicial intrusion into the administrative domain" with respect to rates regulated under the ICA, *Arrow Transportation Co. v. Southern Railway*, 372 U.S. 658, 670 (1963), whether the threat of such intrusion emerges in the form of common law damage actions, antitrust damage actions, or injunction actions.

The progenitor of the filed rate doctrine is *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which held that, by establishing a comprehensive scheme of rate regulation in the Interstate Commerce Act, Congress intended to bar damage actions challenging regulated rates under the common law. The opinion recognized that "repeals by implication are not favored" and that such repeals are only appropriate where recognition of the pre-existing right would render the new statute "nugatory." *Id.* at 437. Nonetheless, the Court concluded that the statutory scheme would be

[16] Neither the Second Circuit's opinion nor Petitioners' Brief refers to the filed rate cases discussed here.

frustrated if shippers were permitted to challenge rates through extra-statutory theories, and therefore reversed the judgment for the plaintiff.

This basic principle has been applied and extended over time. Indeed, next in development were the cases that confronted challenges to filed rates in the antitrust context: *Keogh* in 1922, which relied on *Abilene Cotton Oil*, *see* 260 U.S. at 164, and then, in succession, *Terminal Warehouse Co. v. Pennsylvania Railroad*, 297 U.S. 500 (1936), and *Georgia* in 1945. Slightly more than a decade later, *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), held that, even absent a statutory reparations remedy applicable to motor carriers, the ICA defined the full extent of shipper remedies, and the United States as a shipper could not maintain a damage action for unreasonably high rates.[17] Soon thereafter, this Court precluded the entry of orders that would affect not only the level, but the *timing* of regulated rates, in recognition of the "close nexus" between the exclusivity of the ICA's suspension remedy and the principle barring extra-statutory damage actions. *Arrow*, 372 U.S. at 668. This doctrine has been reaffirmed consistently since *Arrow*, and was recently extended to include the proposition that, even where an appellate court has properly vacated an ICC order, it does not possess authority to reinstate the pre-existing rates. *Burlington Northern Inc. v. United States*, 459 U.S. 131, 142 (1982).[18]

[17] The Interstate Commerce Act was amended by the Motor Carrier Act of 1965 to create a statutory reparations remedy applicable to motor carriers. Pub. L. No. 89-170, 79 Stat. 648. Subsequent attempts by the United States and by a private shipper to assert a right to restitution were rejected on the authority of *T.I.M.E. United States v. Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974); *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974).

[18] As the Court stated in *Burlington Northern*:

> the Court of Appeals did that which we have said a federal court may not do: *i.e.*, freeze the rate that railroads charge

As developed over time, the filed rate doctrine rests upon three fundamental premises, each of which reflects this Court's interpretation of legislative intent. First, Congress intended that the ICA standards governing rate lawfulness be consistently applied by a single agency rather than be subject to conflicting decisions by the courts. To allow judicial attacks would lead to "the absolute destruction of the Act and the remedial provisions which it created" by undermining the duty that "the statute casts upon [the ICC] of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." *Abilene Cotton Oil*, 204 U.S. at 440-41. *See also Keogh*, 260 U.S. at 163. Requests for judicial relief that require the court to give "some consideration" to the question of rate lawfulness under the ICA are barred, because the prospect of conflicting results is "hazardous to [the] uniformity" Congress sought in the ICA. *Arrow*, 372 U.S. at 670-71. *See also Keogh*, 260 U.S. at 163-64. Therefore, the application of ICA standards, such as rate reasonableness, must be left exclusively to the Commission, for the courts have *no* competence on such questions. *See T.I.M.E.*, 359 U.S. at 473-74. *See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (relying on *Abilene Cotton Oil* for the proposition that "rate regulation was within the exclusive jurisdiction of the Commission").

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shippers prior to a decision by the Commission as to what a reasonable rate should be. That approach undermines the Commission's ability to exercise the primary jurisdiction delegated to it by Congress to insure equitable and uniform rates.

459 U.S. at 142. *See also Consolidated Rail Corp. v. National Association of Recycling Industries*, 449 U.S. 609, 612 (1981) ("when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 698-99 (1973); *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 817-21 (1973).

Second, the filed rate doctrine fulfills the statutory goals of the ICA by avoiding the imposition of extra-statutory remedies that would derogate from the delicate balance struck by Congress. Thus, injunction orders affecting the timing of rates are forbidden because such relief "would interfere with the careful way in which the Commission's suspension power takes into account the need of the carrier to receive a reasonable rate of return, and the desire of the shipper to pay only what is lawful." *Burlington Northern*, 459 U.S. at 139. *See also Arrow*, 372 U.S. at 664. Moreover, as to damage actions that challenge the level of rates, Congress did not intend to provide for additional remedies that may be inconsistent with the regulatory scheme. *See Keogh*, 260 U.S. at 162.

Finally, contrary to Petitioners' suggestion, the application of the doctrine does not turn on a particular perception of where the equity may lie between shippers and carriers. Congress has provided comprehensively for the interests of both shippers and carriers, and this Court has recognized that it is not for the judiciary to upset that balance. *T.I.M.E.*, 359 U.S. at 479-80.[19] Nor does the doctrine mean that damage and injunction actions may be heard by the courts so long as certain issues are referred to the ICC, for just such a proposition was rejected in both *Keogh*, 260 U.S. 163-64, and

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[19] In *T.I.M.E.*, the Court, pointing to various provisions of the ICA that tilt decidedly in the shipper's favor, flatly rejected the suggestion that denying shippers an extra-statutory remedy would be "to sanction injustice":

> Congress has in the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and . . . the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect, at least so long as they were within the "zone of reasonableness."

359 U.S. at 478-79.

T.I.M.E., 359 U.S. at 474-75.[20] The outcome-determinative issue is not judicial balancing of equities or procedural deference to agency expertise, but congressional intent that ICA remedies be *exclusive* as to rates. *Arrow*, 372 U.S. at 667; *Keogh*, 260 U.S. at 162.

2. *The filed rate doctrine is essential to implement legislative intent.*

Analysis of the Interstate Commerce Act, its history and its purposes, confirms that *Keogh* and the filed rate cases correctly interpreted and applied a congressionally-mandated scheme of rate regulation unparalleled in its pervasiveness. In fact, the ICA represents a comprehensive statutory system designed by Congress to substitute government rate regulation for the unrestrained pricing characteristic of a "freely competitive market."

The rate regulation powers delegated to the ICC, as strengthened by Congress over time, and as fully applicable to Respondents' rates not only during the period covered by the complaints, but even today, are plenary.[21]

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[20] *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). There the Court held that a state court could not entertain a breach of contract action where the damage claim depended upon an impermissible "assumption that the higher rate respondents might have filed with the [Federal Power] Commission was reasonable." *Id.* at 580.

[21] Congress progressively strengthened the ICA's rate powers in a series of statutes enacted between 1887 and 1948. *See* the Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887) (creating the ICC, the standards of rate reasonableness and non-discrimination, and the tariff filing system); the Elkins Act, ch. 708, 32 Stat. 847 (1903) (imposing criminal penalties for any departure from published tariffs); the Hepburn Act, ch. 3591, 34 Stat. 584 (1906) (authorizing the ICC to prescribe maximum rates on its own initiative and strengthening the ICC reparations remedy); the Transportation Act of 1920, ch. 91, 41 Stat. 456 (empowering the ICC to set minimum rates and oversee the orderly development of a national transportation system); the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (extending the plenary rate powers to motor carriers); the

All rates must meet two independent legal standards, one prohibiting unreasonably high or low rates and the other barring rates that unjustly discriminate among shippers. 49 U.S.C. §§ 10701, 10741 (1982).[22] To enforce these standards, the ICC is empowered, either upon complaint of a shipper or a carrier, or on its own motion, (1) to investigate rates, (2) to suspend proposed rates, thus postponing their effective date pending investigation, (3) to invalidate non-complying rates, and (4) even to prescribe a particular lawful rate. *Id.* at §§ 10704, 10708. Shippers may invoke these remedies to challenge existing and proposed rates, and to seek reparations for having paid excessive rates in the past. *Id.* at § 11705(b)-(c).

Central to the working of the regulatory scheme is the tariff system. All rates must be filed in published tariffs and maintained with the ICC. "[A]ny kind of departure from the published rates" is made a crime,[23] and no rate

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Transportation Act of 1940, ch. 722, 54 Stat. 898 (establishing the national transportation policy that directed the ICC to balance shipper and carrier needs in the public interest); *and* the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (authorizing the ICC to oversee collective ratemaking activities and to grant express immunity for such activities). Between 1948 and 1980 there were only two minor amendments to the portions of the ICA governing motor carriers, neither of which affected the rate powers at issue in this case. *See* the Motor Carrier Act of 1965, Pub. L. No. 89-170, 79 Stat. 648; the Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568. Amendments affecting the railroad industry obviously are not applicable here, and, as discussed below, the Motor Carrier Act of 1980 preserved all of the ICA rate regulation powers that lie at the heart of *Keogh* and *Georgia*. *See infra* pp. 32-33 & note 48.

[22] The "principal thing aimed at" in the statute was to foster price uniformity by prohibiting discrimination. *Houston, East & West Texas Railway v. United States*, 234 U.S. 342, 356 (1914). *See also American Trucking Associations v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 406 (1967).

[23] *United States v. Braverman*, 373 U.S. 405, 406 (1963).

can be changed without advance notice. *Id.* at §§ 10761-62, 11903 (1982). Congress imposed a rigid tariff filing requirement because it is the key to self-enforcement: armed with notice of all existing rates and of proposed rate changes, shippers can enforce the ICA guarantees of reasonable rates, of equal treatment and of protection against surprise changes. Because of its importance, the filed rate is considered immutable: "tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939).[24] The purpose is "to secure uniformity of treatment to all" by requiring that filed "rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed." *Kansas City Southern Railway v. C.H. Albers Commission Co.*, 223 U.S. 573, 597 (1912).[25]

This comprehensive scheme of rate regulation was the product of two related congressional purposes, the first of which was to substitute government regulation for unfettered price competition. Initially, Congress was concerned that railroads in many cases had the market power to charge unreasonably high rates, that competition could not be relied upon "to secure the shipper against abuse and unjust discrimination," and that there-

[24] *See also A.J. Poor Grain Co. v. Chicago, Burlington & Quincy Railway*, 12 I.C.C. 418, 421-23 (1907) ("when once lawfully published, a rate, so long as it remains uncanceled, is as fixed and unalterable . . . as if that particular rate had been established by a special act of Congress").

[25] *See also Robinson v. Baltimore & Ohio Railroad*, 222 U.S. 506, 509-11 (1912) (for a court to award damages based on filed rates "would be destructive of the uniformity and equality which the act was designed to secure" and would present the "confusing anomaly . . . of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obilgatory upon both carrier and shipper").

fore regulation was necessary to protect shippers.[26] Congress subsequently concluded more broadly that free competition by railroads was inherently destructive and incapable of serving the long term interests of carriers, shippers and the public in a sound and adequate system.[27]

This legislative purpose was clearly reflected in the 1920 amendments, which empowered the ICC to prescribe minimum rates, thus preventing carriers from competing away necessary profits. Ch. 91, 41 Stat. 456 (1920).[28] The same goal was again evident when the Act was extended in 1935 to include motor carriers:

> competition has been carried to an extreme which tends to undermine the financial stability of the carriers. . . . The present chaotic transportation conditions are not satisfactory.

[26] S. Rep. No. 46, 49th Cong., 1st Sess. 176 (1886). *See also* H.R. Rep. No. 591, 59th Cong., 1st Sess. 2, 5 (1906) (legislation extending ICC power to prescribe a maximum reasonable rate based in part on shipper complaints that rail rates are too high).

[27] *See Petroleum Between Washington, Oregon, Idaho, and Montana*, 234 I.C.C. 609, 637 (1939) ("reasonable prosperity for the carriers is in the final analysis to the advantage of those whom they serve"), *aff'd sub nom. Scandrett v. United States*, 32 F. Supp. 995, 1000 (D. Or. 1940) (upholding ICC decision that proposed rates, though compensatory, would not yield a fair return), *aff'd mem.*, 312 U.S. 661 (1941).

[28] *See, e.g.*, 58 Cong. Rec. 8317 (1919). *See also Dayton-Goose Creek Railway v. United States*, 263 U.S. 456, 478 (1924) (the effect of the 1920 Act was to put the transportation industry "under the fostering guardianship and control of the Commission" in order to "build up a system of railways"); *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway*, 270 U.S. 266, 277 (1926) ("competition between carriers may result in harm to the public as well as in benefit"); *Anchor Coal Co. v. United States*, 25 F.2d 462, 471-72 (S.D.W. Va. 1928) (the ICC may prescribe minimum rates "to guarantee reasonable earnings, not only to the carriers affected, but also to competing carriers, who may labor under a higher cost of doing business").

S. Rep. No. 482, 74th Cong., 1st Sess. 2 (1935).[29] This view carried forward to 1940, when Congress enacted the National Transportation Policy ("NTP"), which included as one objective the avoidance of "destructive competitive practices." Ch. 722, § 1, 54 Stat. 898, 899 (1940) (*codified at* 49 U.S.C. § 10101(a)(1) (1982)). And this same intent was reflected in the legislative history of the 1948 Reed-Bulwinkle Act, when the regulatory scheme was being strengthened to include ICC control over collective ratemaking as well as over the rates themselves:

> in the field of transportation important objectives of the antitrust laws are achieved by means of Government regulation. For example, the antitrust laws are designed to protect the public from unreasonable and excessive prices or unduly limiting production. But resort to such laws is not necessary for that purpose in the case of common carriers because the objective of reasonable prices is achieved by other means, that is, by clothing governmental authorities with the power to fix reasonable rates and charges.

S. Rep. No. 44, 80th Cong., 1st Sess. 4 (1947). In short, Congress determined that free competition would be destructive to the long-run public interest in maintaining an economically-sound transportation system, and that the plenary powers of the ICA were necessary to produce the uniform, reasonable, and non-discriminatory rates that free competition could not.[30]

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[29] *See also Carla Ticket Service, Inc., Broker Application*, 91 M.C.C. 721, 722 (1962) ("The fundamental and original purpose underlying the economic regulation of motor carriers was to protect the public from the damaging effects of ruinous competition among carriers. Such regulatory concept derives its validity from the public utility characteristics of the transportation industry. . . ."), *rev'd on other grounds*, 94 M.C.C. 579 (1964). *See generally* M. Fair & E. Williams, *Economics of Transportation* 487-89 (rev. ed. 1959).

[30] The contrast between the regulatory scheme and the price competition characteristic of a free market has been repeatedly

The second, related purpose of regulation was to allow the ICC, as a "central planner," to strike the necessary balance between shipper and carrier interests. The National Transportation Policy, which was enacted to guide the ICC's administration of the Act, codified this concept in specific regulatory goals. Thus, the statute required balancing the shippers' interest in "the establishment and maintenance of reasonable charges for transportation services" against the promotion of "sound economic conditions" necessary to allow carriers to provide "safe [and] adequate . . . service." 49 U.S.C. § 10101(a)(1) (1982). To foster the orderly development of the transportation system, and to make these trade-offs "in the public interest," required a single nationwide authority:

> under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein.

S. Rep. No. 433, 76th Cong., 1st Sess. 3 (1939).[31]

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recognized by Justice Department officials. *See, e.g., Oversight of Freight Rate Competition in the Motor Carrier Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st and 2d Sess. 5-12 (1977-78) (statement of Assistant Attorney General Shenefield). *See also Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess., Parts 4 and 5, at 1340, 1589 (1979-80).

[31] For over 50 years, the ICC used its regulatory authority over rates to fulfill the public interest in a sound transportation system by protecting carriers from destructive competition. *See, e.g., Import and Domestic Rates on Vegetable Oils*, 78 I.C.C. 421, 427-28 (1923) (proposed rail rate reduction disallowed because it amounted to "destructive competition"); *Rockne Bros.-Commodities Between Sioux City, Iowa, and South Dakota*, 19 M.C.C. 739, 741 (1939) (refusing to allow a rate reduction because to do so would be "inconsis-

To fulfill these purposes, Congress created special standards and remedies, foreign to the free market notions that underlie the damage theories in this case. Congress intended this regulatory scheme to govern the structure, level and timing of rates, and to preclude "judicial intrusion into the administrative domain." *Arrow*, 372 U.S. at 670. From 1907 to 1982, the Court's filed rate cases, including *Keogh* and *Georgia*, recognized this fundamental maxim.

3. Keogh *accommodates the congressionally-recognized interests.*

In this context, *Keogh* and the filed rate cases properly assess and accommodate the congressionally-recognized interests, not merely those implicated by collective ratemaking, but, as well, the carefully-balanced interests of carriers and shippers embodied in the ICA rate powers, which Petitioners and the Government never mention.[32]

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tent with our duty . . . to foster sound economic conditions in the motor-carrier industry"); *Paper Articles Ratings, Illinois Freight Association*, 10 M.C.C. 329, 332 (1938) (cancelling a "competitive" rate reduction because it would "break down the existing rate structures"); *Alcoholic Liquors from Ohio, Indiana, and Kentucky to St. Louis*, 49 M.C.C. 703, 707-08 (1949) (rate reductions disallowed because not compensatory); *Motor Vehicles, Kansas City and Valley Park, Mo., to Southwest*, 332 I.C.C. 615, 625-26 (1968) (reduced rates disapproved where they would result in "needless dissipation" of carrier revenue); *Foodstuffs, from Florida to Ohio*, 355 I.C.C. 773, 777 (1977) ("It is the duty of the Commission to promote adequate and economical service while fostering sound economic conditions in transportation.").

[32] Petitioners, like the Government, see the issue solely in antitrust immunity terms, and thus ignore all interests except those involved in the trade-off between individual and collective ratemaking. Pet. Brief at 17; U.S. Brief at 20-21.

Keogh works no injustice on shippers, for the bar to antitrust damages does not impair their rights under the ICA to obtain reasonable and non-discriminatory rates.[33] As described above, Congress in the Interstate Commerce Act gave shippers not only the guarantee of a "fair" rate, but special rights and remedies far greater than those enjoyed by ordinary customers in unregulated markets. Customers under an antitrust regime are *not* entitled, for example, to know what their competitors are paying or to advance notice of proposed price changes and an opportunity to challenge them.[34] Shippers have these rights under the ICA, together with a panoply of remedies that includes having unlawful rates set aside, reparations awarded and a new rate prescribed that is not discriminatory or too high.[35]

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[33] Petitioners assert that "[d]isadvantaged shippers are unable to obtain effective relief from the ICC" because "the ICC reviews 'only a random sampling of tariff filings.'" Pet. Brief at 12-13. Petitioners fail to note, however, that disadvantaged shippers may themselves compel review by invoking the procedures and remedies of the Interstate Commerce Act any time they believe that they have been charged an unreasonable or discriminatory rate. *See* 49 U.S.C. §§ 10704(f), 11701 (1982). Moreover, the *ATA* Court expressly noted that, prior to 1979 (i.e., for 13 of the 16 years involved here), "the Commission's staff examined every filing prior to the effective date of the proposed tariff and, if an obvious defect was discovered, the tariff was rejected immediately." 104 S. Ct. at 2463 n.4. And of course, as a result of *ATA*, shippers may seek overcharge awards for substantial violations of rate bureau procedures. *Id.* at 2467. *See infra* p. 34.

[34] Antitrust policy values secret discounting, particularly in concentrated markets, and any efforts by competitors to forestall or "regulate" such competition through the exchange of current or future price information can violate the civil and criminal provisions of the Sherman Act. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Container Corporation of America*, 393 U.S. 333 (1969).

[35] In contrast, customers have no right under the antitrust laws to challenge a "monopoly" price, for those laws condemn only mo-

Keogh and *Georgia* also preserve incentives to comply with rate bureau procedures, for as recognized in those decisions, the Justice Department is free to pursue antitrust enforcement through criminal or civil prosecutions where the evidence warrants.[36] In addition to the prosecutorial powers of the United States, there are also the ICC's enforcement powers, which have grown since 1948 and remain untouched by *Keogh*. Those powers include withdrawing antitrust immunity from rate bureaus that breach Commission regulations and, today, imposing retroactive tariff nullification, the "harsh" new remedy for substantial rate bureau violations that this Court approved in *ATA*. Thus, by narrowly restricting a single antitrust remedy, *Keogh* and *Georgia* vindicate congressional intent that ICA standards and remedies alone govern rates, but do so without affecting shipper rights under the ICA or government enforcement tools.

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nopolization, not the exercise of lawfully-obtained monopoly power. *See United States v. Aluminum Company of America*, 148 F.2d 416, 429-30 (2d Cir. 1945). Moreover, the courts have long abjured price reasonableness issues under the antitrust laws. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927).

[36] It is disingenuous to argue that *Keogh* creates an incentive to violate the terms of rate bureau agreements, U.S. Brief at 21, when to do so would be to risk criminal penalties of three years incarceration and fines of up to $100,000 for individuals and $1,000,000 for corporations. 15 U.S.C. § 1 (1982). Moreover, government enforcement has been successful in the cases to which *Keogh* has been subsequently applied to bar antitrust damages. The *Iron Ore*, *Minsky* and *Monticello Heights* cases were all subjects of criminal antitrust prosecutions for rate bureau violations. *See United States v. Bessemer & Lake Erie Railroad*, 717 F.2d 593 (D.C. Cir. 1983); *United States v. Auto Driveaway Co.*, 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981) *and United States v. Morgan Drive Away, Inc.*, 1974-1 Trade Cas. (CCH) ¶ 74,888 (D.D.C. 1974). This case followed a government civil action and entry of injunctive relief, *United States v. Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984), and the defendants in *Georgia* also faced an injunction action.

In sum, Petitioners and the Government carry a heavy burden in seeking reversal of established precedent. They must overcome not simply sixty years of established law represented by *Keogh* and its progeny, but the entire filed rate jurisprudence of this Court, the congressional intent on which all of those decisions rest, and the sensible accommodation of congressionally-recognized interests that follows. Rather than meeting these considerations head-on, however, Petitioners and the Government challenge the continuing "need for" *Keogh*.

B. The "need for" *Keogh* has not changed.

1. *The Reed-Bulwinkle Act of 1948 did not "supplant" the* Keogh *principle.*

In the Reed-Bulwinkle Act of 1948, Congress officially sanctioned collective ratemaking by common carriers. As the legislative history reflects, collective ratemaking organizations were considered by carriers, shippers and the ICC to be practical necessities for the carriers to comply with the rate standards of the Interstate Commerce Act.[37] Therefore, in response to Justice Department antitrust prosecutions of rate bureaus and this Court's decision in *Georgia* to allow an injunction action to proceed,[38] Congress delegated to the ICC the authority to approve the

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[37] For example, the Senate Report stated:

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder, and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent.

S. Rep. No. 44, 80th Cong., 1st Sess. 6-7 (1947).

[38] *United States v. Association of American Railroads*, 4 F.R.D. 510 (D. Neb. 1945); *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945).

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organization and operation of rate bureaus, to confer antitrust immunity with such approval, and to supervise collective ratemaking conduct.[39]

The centerpiece of Petitioners' Brief is the argument that passage of the express antitrust immunity provision in the Reed-Bulwinkle Act obviated any further need for the *Keogh* doctrine. Pet. Brief at 16-33. This argument proceeds from the erroneous proposition that *Keogh* was designed to protect "lawful" joint ratemaking. *Id.* at 10. From this point, Petitioners contend that Reed-Bulwinkle represented a congressional accommodation of the *same* policy considerations addressed in *Keogh*, that passage of Reed-Bulwinkle therefore eliminated the "need for" *Keogh*, and that the legislative history of Reed-Bulwinkle indicates that it "define[s] the extent of antitrust immunity." *Id.* at 18, 20 and 21. This argument amounts to a sleight of hand, as Petitioners attempt to re-define *Keogh* as the precursor of Reed-Bulwinkle so they can argue that the legislation supplanted this Court's decision.[40]

On the contrary, *Keogh* and the Reed-Bulwinkle Act are two different solutions addressed to two entirely different problems. *Keogh* does not purport to create an antitrust immunity to shield collective ratemaking *conduct;* it restricts only the application of one antitrust *remedy* to prevent direct judicial interference with ICA rate regulation. *Keogh* and *Georgia* both recognize that the underlying conduct remains fully subject to antitrust sanctions that do not involve filed rates, including criminal prosecutions and injunction actions. In short, the

[39] Thus, unlike the situation presented in *Georgia*, the ICC has been empowered since 1948 to regulate rate bureau procedures. *See ATA*, 104 S. Ct. at 2462.

[40] The government forthrightly acknowledges that Reed-Bulwinkle did not "overrule" *Keogh*. U.S. Brief at 16.

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Keogh rule turns on the nature of the relief sought, not the substantive violation alleged.

In contrast, the issue before Congress in passing Reed-Bulwinkle was not the need to protect filed rates from judicial interference reflected in *Keogh*. Rather, as the Second Circuit's thorough analysis of the legislative history indicates, "the need for the legislation" arose from the threat to rate bureaus posed by criminal prosecutions and the injunction action permitted in the *Georgia*, not from that posed by treble damage actions, which *Keogh* and *Georgia* already had barred. H.R. Rep. No. 1100, 80th Cong., 1st Sess. 3-5 (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1845-47; S. Rep. No. 44, 80th Cong., 1st Sess. 5-6 (1947). This distinction is clear in the House and Senate reports, which are based on testimony discussing *Keogh*, including ICC Commissioner Aitchison's explanation to the Congress that *Keogh* had "remitted the shipper to the Interstate Commerce Act for any damages," but "uncertainty . . . prevails" regarding "the danger of criminal prosecution or injunction suits." [41]

The two committees that reported out the legislation were "at pains to insert the qualifying phrase" reflecting an intent to preserve, not to retreat from, the existing law, which limited shipper remedies. *Square D*, 760 F.2d at 1359, Pet. App. at 25a. The House and Senate Reports explain that, as to conduct outside the express immunity,

> [t]he bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable.*

[41] *Regulation of Rate Bureaus, Conferences and Associations: Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce*, 79th Cong., 2d Sess. 1148-49 (1946) (statement of Commissioner Aitchison). In addition, two representatives of the Justice Department read passages from *Keogh*. *Id.* at 581 (statement of Mr. Wiprud, former special assistant in charge of the Antitrust Division Transportation Section); *Id.* at 799 (statement of Assistant Attorney General Berge).

S. Rep. No. 44 at 7; H.R. Rep. No. 1100 at 5, 1948 U.S. Code Cong. & Ad. News at 1848 (emphasis added). This history simply cannot be read, as Petitioners would have it, to resurrect the antitrust damage theory *Keogh* had long since barred. *See* 760 F.2d at 1356-60, Pet. App. at 19a-26a. As the Second Circuit held, "there is no basis . . . to infer that Congress intended to [overrule *Keogh*] by implication, particularly since neither the purposes nor the operation of the *Keogh* doctrine and the Reed-Bulwinkle Act conflict." 760 F.2d at 1360, Pet. App. at 26a.[42]

2. *The* Carnation *decision is not inconsistent with Keogh.*

Petitioners' reliance on *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), rests on the same false premise as their Reed-Bulwinkle argument. It assumes that *Keogh* represents a "blanket" antitrust immunity for otherwise illegal conduct, the "need for" which is governed by the presence or absence of an express immunity. As explained above, however, *Keogh* deals with protecting a statutory scheme of pervasive

[42] That the legislative history of the Motor Carrier Act of 1980 states that antitrust immunity was "a result of" Reed-Bulwinkle, Pet. Brief at 30-31, says no more about the "need for" *Keogh* than the Reed-Bulwinkle Act does—namely, nothing.

Petitioners' further contention that, in Reed-Bulwinkle, Congress contemplated only protecting "proposed" conduct and not the implementation of an agreement is both beside the point and blind to the plain language of the statute. Pet. Brief at 23-24. The immunity provision covers not just the formation of rate bureaus, but expressly includes the "carrying out" of rate bureau agreements. "Carrying-out" was intended to be subject to *post hoc* supervision by the Commission, not *ex ante* review. *See* H.R. Rep. No. 1100 at 12, 1948 U.S. Code Cong. & Ad. News at 1855. It is equally unsound to suggest that an agreement *not* to file a rate may be unlawful, Pet. Brief at 12, for if carriers can agree to charge one kind of rate with immunity, they must be able to agree *not* to charge another kind. That is the heart of collective ratemaking.

rate regulation from judicial interference, a problem unrelated to whether collective ratemaking should be immunized. Thus, as the Second Circuit found, there was no need for the Court in *Carnation* to "overrule *Keogh* or even seriously to question that decision" because there was a "sound basis . . . for distinguishing *Keogh*." 760 F.2d at 1362, Pet. App. at 31a-32a.

The basis for that distinction is the fact that, in contrast to the ICA, the Shipping Act at the time of *Carnation* did not contain the sort of regulatory mandate that would justify the rule in *Keogh* and the other filed rate cases. Congress imposed on ocean shipping a "very limited regulatory scheme" that "does not give the [Federal Maritime Commission] any mandate to regulate *rate* competition and, indeed, . . . was designed to minimize the role of the FMC in this regard." *Id.* at 1362-63, Pet. App. at 32a-34a.[43] For example, unlike the ICC, the Maritime Commission could not suspend a proposed tariff, could not prescribe a reasonable rate, and could not disapprove a rate and award reparations except in very limited circumstances. *Id.* at 1363, Pet. App. at 34a.

[43] Congress has never granted the FMC the type of pervasive rate regulation powers that it has granted to the ICC. As the Senate Commerce Committee stated in reporting the 1961 amendments to the Shipping Act:

> Whereas Congress has vested rate control powers and responsibilities in Government regulatory agencies concerned with domestic surface and air transportation, it has heretofore given to the maritime regulatory agencies no similar mandate over international shipping rates.

S. Rep. No. 860, 87th Cong., 1st Sess. 5 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 3108, 3112. *See also* H.R. Rep. No. 53, Part II, 98th Cong., 1st Sess. 3 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 221, 222 ("except for a seldom exercised power to disapprove rates found to be 'so unreasonably high or low as to be detrimental to the commerce of the United States' (46 U.S.C. § 817), the FMC does not possess authority to set rates in foreign commerce").

The Second Circuit's conclusion underscores not only the distinction between the *Carnation* and *Keogh* decisions, but the reason why the *Keogh* decision was a correct one:

> the pervasive authority of the ICC respecting the rates and business of carriers under its jurisdiction is absent from transportation subject to the more limited scrutiny of the FMC.

Id.

3. *The Motor Carrier Act of 1980 did not change the scheme of rate regulation, but served to create an administrative remedy for rate bureau violations that is consistent with* Keogh.

Petitioners and the Government rely on the Motor Carrier Act of 1980 to support their argument that *Keogh* should be overruled in this case. Pet. Brief at 41-44; U.S. Brief at 23-25.[44] This reliance is peculiar in that the legislation, which became effective on July 1, 1980, was law for at most a few months of the sixteen-year period involved here. *See* 760 F.2d at 1360 n.7, Pet. App. at 27a n.7 *and* U.S. Brief at 24 n.31. Indeed, Petitioners did not suggest below, and do not suggest here, that any damage claims arising out of those few months should be treated differently than the claims arising prior to the effective date of the 1980 Act. *See* 760 F.2d at 1355, Pet. App. 17a.

In addition, the 1980 Act did not disturb the scheme of rate regulation that lies at the heart of *Keogh*. The

[44] The Government also refers to legislation affecting railroads and airlines. U.S. Brief at 25 n.33. In the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress, *inter alia*, redefined the Commission's reasonableness powers over rail rates, but left unaffected the powers with respect to discriminatory rates. No comparable statutory amendment has affected ICC authority over motor carrier rates. Developments in other industries such as airlines are irrelevant to the issue of congressional intent presented by this case.

ICC today retains its historic power to control motor carrier rates, including the authority to determine whether rates are unreasonably high or low or unjustly discriminatory, as well as the authority to suspend, investigate and invalidate rates that do not comply with the ICA. 49 U.S.C. §§ 10701, 10704, 10708 (1982).[45] Nor does the 1980 Act detract from the fact that, throughout the period covered by the complaints, shippers continued to challenge rates under the ICA[46] and to seek reparations for excessive rates,[47] and the Commission continued to protect the financial health of motor carriers as necessary to the long-run public interest.[48]

[45] The 1980 Act gave greater emphasis to competition, most notably by reducing entry restrictions and eliminating collective ratemaking for single line rates as of 1984. While the 1980 Act also contained a "zone-of-rate-freedom" provision that increased carrier flexibility to raise and lower individually-made rates within certain limits, 49 U.S.C. § 10708(d) (1982), that provision applies only where a carrier specifically invokes it, has been rarely used, *Expansion of Zone of Reasonableness*, 367 I.C.C. 907, 909 (1984), and does not cover any of the rates challenged by Petitioners.

[46] *See, e.g., General Increase, New England Motor Rate Bureau, April 1985*, ICC Docket No. 39952 (Mar. 27, 1985) (ordering investigation of proposed general rate increase on the basis of shipper protests that rates would be unreasonably high); *General Increase, April 1978, S.M.C.R.C.*, 361 I.C.C. 1 (1978); *General Increase, Middle Atlantic and New England Territories*, 332 I.C.C. 820 (1969). Indeed, whether shippers protest or not, the ICC reviews every general rate increase proposed by a rate bureau, including the NFTB, under procedures requiring the submission of detailed cost justification data. *See* 49 C.F.R. § 1139 (1984).

[47] *See, e.g., United States v. Central Truck Lines, Inc.*, 548 F.2d 523 (5th Cir. 1977); *United States v. Mercury Motor Express, Inc.*, 355 I.C.C. 460, 473 (1976); *United States v. Consolidated Freightways Corp.*, 350 I.C.C. 1, 8 (1974); *United States v. Western Gillette, Inc.*, 343 I.C.C. 29, 37 (1972).

[48] *See* cases cited *supra* note 31. Moreover, in the Motor Carrier Act of 1980, Congress required the ICC to adopt standards to allow

For purposes of this case, however, there is a greater significance to the 1980 Act: it created a basis for a new administrative remedy for rate bureau violations that is potent but avoids the concerns underlying *Keogh* and the filed rate doctrine. The Court in *ATA* held that the 1980 Act allowed the Commission "to approve motor-carrier tariffs on the condition that the Commission may later nullify increases found to have been submitted in substantial violation of rate bureau agreements." *ATA*, 104 S. Ct. at 2466. Nullification of rates approved under this new condition would subject the carriers to liability for the difference between the nullified rate and the prior rate. The Court recognized that such awards were potentially "ruinous" to carriers, but took comfort in the fact that this "harsh" remedy would be administered with discretion by the ICC. *Id.* at 2468 & n.13.

The *ATA* remedy is the appropriate one for rate bureau violations such as those alleged here because it is an *ICA* remedy, and therefore is consistent with the filed rate doctrine. Under *ATA*, the ICC determines whether carriers have acted beyond the scope of an ICC-approved rate bureau agreement, and, if so, whether shippers were injured. Then, depending upon resolution of these issues, it is left to the Commission's discretion to decide if the imposition of sanctions will advance or retard the policies of the ICA. Thus, the power approved in *ATA* not only strengthens the remedies available to shippers under the ICA, but leaves the critical and traditional regulatory issues—whether to nullify the filed rate and whether to impose sanctions—precisely where Congress intended them to be, with the ICC, not the courts.[49]

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motor carriers to attain adequate revenue levels. 49 U.S.C. § 10701(e) (1982). *See* H.R. Rep. No. 1069, 96th Cong., 2d Sess. 26, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2308.

[49] Petitioners rely on *ATA* to refute the erroneous proposition, improperly attributed to Respondents, that "*Keogh* . . . immunizes

C. There are no procedural devices that can replace *Keogh*.

For sixty years, *Keogh* has fulfilled congressional intent in consistent administration of the ICA by remitting shippers to the ICC for rate challenges. Petitioners and the Government have offered no principled rationale to justify a departure from that doctrine or retroactive imposition of antitrust damage liability based on the hundreds of Respondents' rates that have been subject to pervasive regulation for so many years in the past. However, beyond the facts of this case, there remain the policy-driven arguments why *Keogh* should be overruled, including principally the notion that the conflicts that *Keogh* and the filed rate cases have prevented in the past can in the future be avoided altogether or managed through

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all activities encompassed within plaintiffs' complaint." Pet. Brief at 33. This reliance is mispiaced, for *ATA* dealt solely with the narrow issue of Commission authority to create a new remedy under the Motor Carrier Act of 1980 to enforce rate bureau agreements. 104 S. Ct. at 2460, 2462. Petitioners and the Government refer to general statements in *dicta* regarding "whatever" antitrust damages may be allowed as if the Court assumed *Keogh* had been overruled, or, without ever mentioning *Keogh*, was nevertheless overruling that decision *sub silentio*. Passing the Court's frequent citation of *Keogh* with approval in other recent decisions, *see supra* note 11, this strained reading does not square with two facts: first, in *ATA* the United States premised its policy justification for new Commission powers on the ground that, *because of Keogh*, shippers lacked adequate remedies under the antitrust laws. Reply Brief for the Petitioners, *ATA*, at 5. Second, consistent with the view propounded by the Government, the Court in *ATA* held that Congress intended "the Commission—and not the threat of antitrust liability—[to] be the primary enforcer of [rate bureau agreements]." 104 S. Ct. at 2466-67. Finally, the Court's statements about antitrust liability are limited to contexts not present here, regardless of whether those statements referred to antitrust damage claims not based on filed rates or to claims based on rates the ICC had previously nullified. In the present case, the filed rates challenged in the complaints have in no sense been nullified or otherwise invalidated by the ICC, and thus even an expansive reading of *ATA* will not resurrect Petitioners' claims.

a dual system of rate adjudication in both the agency and the courts. In urging such a change in the law, Petitioners and the Government ignore the ramifications of their drastic proposal.

a. The question of how to resolve inevitable regulatory issues in the context of an ongoing antitrust case cannot be avoided. As the courts have uniformly recognized, every antitrust damage claim based on excessive rates would require a determination that the hypothetical lower rate satisfies ICA standards. It is therefore disingenuous for Petitioners to assert that ICC expertise is not essential "because the vast majority of freight tariffs . . . become effective with no [ICC] review whatsoever," Pet. Brief at 36; the point is that here Petitioners are asking a court to award damages based upon a judicial determination of rates other than those charged by Respondents in filed tariffs, rates that would have been subject to ICA standards and to review by the Commission. Nor is it helpful for the Government to suggest that a hypothetical lower rate could fall within the "zone of reasonableness" and therefore "not violate the rate structure or infringe upon the ICC's authority," U.S. Brief at 18, for that is precisely *one* of the questions to be decided with respect to each hypothetical rate: does it fall within the zone? [50] The United States conceded in *T.I.M.E.*, 359 U.S. at 473-74, and seems to concede here, *see* U.S. Brief at 20 n.26, that courts and juries are not competent to make that

[50] The Government recognizes that the rate may be too low because it is not compensatory. U.S. Brief at 20 n.26. But even a compensatory rate within the zone may be still too low because it does not fulfill the revenue needs of carriers to which the rate would apply, or it unduly diverts traffic from competitors, or unjustly discriminates among shippers. These are issues for the Commission, not the courts. *Cf. Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 n.11 (1981) (the fact that a rate increase was within the ceiling established by the regulatory agency does not necessarily mean that the agency would have approved that rate if filed).

decision, which Congress remitted exclusively to the Commission; yet Petitioners' damage theory calls for just such a determination. For courts to undertake such inquiries would destroy the consistent application of ICA standards.[51]

b. The suggested referral of discrete issues to the ICC is not a solution as a matter of law. The issue is not merely one of deference to agency expertise or procedural comity, as Judge Friendly analyzed it. Rather, the issue is one of congressional intent, and the uniform holding of the Court's filed rate cases is that the ICA remedies must be exclusive where shippers claim injury and damages based on filed rates. In these circumstances, the courts simply have no role at all. *Keogh*, 260 U.S. at 162; *T.I.M.E.*, 359 U.S. at 473-74; *Arrow*, 372 U.S. at 669-671.[52]

c. The sudden and complete overhaul of a longstanding doctrine, which Petitioners and the Government propose, will result in the transfer to the courts of a host of complex rate cases once decided by the Commission. Apart from established precedent barring referral of rate issues to the ICC, the problems of consistency, certainty and procedural fairness that would arise in antitrust claims based on regulated rates are too numerous and compli-

[51] *See Mitchell Coal & Coke Co. v. Pennsylvania Railroad*, 230 U.S. 247, 255 (1913) ("If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character."). Equally clear is that this goal could not be realized if the courts and the ICC had concurrent jurisdiction, because of the possible "divergence between the action of the Commission and the decision of a court." *Abilene Cotton Oil*, 204 U.S. at 441.

[52] Indeed, at least one decision raises doubt that, outside the statutory procedures, the ICC would have any authority to consider the reasonableness of hypothetical rates even if requested to do so by a court. *See United States v. Garner*, 236 F. Supp. 632, 635 (E.D.N.C. 1964).

cated to be answered by the referral cases cited by Judge Friendly and the Government.[53] The intractable nature of these problems confirms that *Keogh's* remedy limitation remains the only sure way of vindicating congressional intent in the ICA.

1. First, creation of an antitrust damage remedy would upset the carefully-balanced scheme of carrier rights and shipper remedies crafted by Congress. *See United States v. Associated Transport, Inc.*, 505 F.2d 366, 369-70 (D.C. Cir. 1974) (for a court to permit a shipper the benefit of both statutory rights and extra-statutory remedies would be to bestow impermissibly "the best of both worlds"). The ICA directs the Commission to promote "sound economic conditions" by giving due regard to carrier revenue needs, and the ICC uses that discretion in employing the remedial provisions of the statute. 49 U.S.C. § 10101(a)(1)(1982). *See ATA*, 104 S. Ct. at 2468 & n.13.[54] A court has no such mandate under the antitrust laws. If treble damages meted out by various courts and juries were to weaken significantly or bankrupt a competitor, or cripple the industry, the Commission's ability to carry out the National Transportation Policy would be destroyed—precisely the opposite of what Congress intended.[55]

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[53] *See Square D*, 760 F.2d at 1353, Pet. App. at 11a-12a; U.S. Brief at 13. For example, referral cases involving (1) interpretation of an *existing* tariff or contract provision or (2) a *statutory* reparations proceeding under the ICA are patently irrelevant.

[54] *See also Burlington Northern Inc. v. United States*, 459 U.S. 131, 141-42 (1982).

[55] *See Bankamerica Corp. v. United States*, 462 U.S. 122, 133 (1983) (new interpretation of antitrust laws would expose individuals to "possible civil liability in unknown amounts"); *National Classification Committee v. United States*, 746 F.2d 886, 892 (D.C. Cir. 1984) (private antitrust actions could "permanently disable" carriers).

2. To determine hypothetical rates for the measurement of antitrust damages would require unprecedented speculation: courts and juries would become engaged in massive efforts to reconstruct hundreds of transportation rates over a span of many years, and then come to some conclusions concerning how the regulatory agency as constituted at various points in the past would have decided rate lawfulness issues based upon philosophy, expertise, and precedent prevailing at the time.[56] The case at bar, for instance, seeks damages for a sixteen (16) year period beginning almost twenty (20) years ago; other cases pending today seek to reach back over thirty (30)

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[56] The difficulty of such an assessment is compounded by the complexity of rate determinations, which are highly fact sensitive and include consideration of a multitude of "regulatory" factors. Among the factors considered under the ICA are:

> cost of service (car-mile costs and revenue are frequently examined in this connection); value of service (what the traffic will bear); the existence *vel non* of competition; the transportation characteristics of the commodity (weight[,] size, density; gold vs. feathers is an example often used as an illustration by rate economists; likewise sand and gravel vs. perishable fruit or vegetables); the anticipated volume of shipments; the distance of the haul; the availability of return loads in the type of equipment used; the economic status of the industry served; the rate level required in order to move the traffic; comparison of the rate under consideration with established rates for comparable shipments in the territory involved; and other pertinent considerations.

New Orleans & Lower Coast Railroad v. International Proteins Corp., 514 F. Supp. 46, 49 (E.D. La. 1981) (quoting *Westinghouse Electric Corp. v. United States*, 388 F. Supp. 1309, 1317 (W.D. Pa. 1975)). *See also Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 806 (1973) ("'The process of rate-making is . . . empiric[,] . . . fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.'") (quoting *Board of Trade v. United States*, 314 U.S. 534, 546 (1942)).

years.[57] No court or agency could apply the fact-intensive and dynamic rate standards of the Interstate Commerce Act across such vast periods of time, not just for each year, but for every sub-period in which any relevant circumstance changed, with any hope of achieving rationality, much less consistency.[58]

3. If rates were subject to antitrust damage actions, the predictability and certainty that prevails today would be replaced by uncertainty. Carriers faced with the destructive threat of treble damages would be foolhardy to charge any new collective rate until the Commission had passed on all aspects of the process by which such rates had been promulgated.[59] And once confronted with an

[57] *See Iron Ore, supra* page 10. It bears mention that both the instant case and the *Iron Ore* cases call for a far more complicated reconstitution of the rate structure than the Court found anathema in *Keogh*. *See* 260 U.S. at 164.

[58] Congress has precluded the ICC from considering rate issues beyond a reasonably contemporaneous time by imposing a two-year statute of limitations on reparations cases. 49 U.S.C. § 11706 (1982). Moreover, the ICC has been reluctant to determine rate lawfulness retroactively, even for the two-year statutory period, because the host of relevant conditions changes so rapidly. *See Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad*, 233 U.S. 479, 488 (1914); *Anadarko Cotton Oil Co. v. Atchison, Topeka & Santa Fe Railway*, 20 I.C.C. 43, 49-50 (1910).

Petitioners cite antitrust damage cases arising under other regulatory schemes, including cases brought by competitors rather than shippers, and argue that these cases involve "the selfsame issue" of damage calculation. Pet. Brief at 37-38. However, courts have viewed competitor cases as distinctly different. *See, e.g., Essential Communications Systems, Inc. v. A.T. & T.*, 610 F.2d 1114, 1121 (3d Cir. 1979). Whatever the merits of such distinctions, this legal question is currently at issue in the lower courts, *see, e.g., Pinney Dock & Transport Co. v. Penn Central Corp.*, 600 F. Supp. 859, 879, 893 (N.D. Ohio 1984), *appeal docketed*, Nos. 84-3653 and 84-3654 (6th Cir. May 21, 1984), and is not before the Court in this case.

[59] As the Seventh Circuit held in *Wheat Rail*:

> To subject the carriers to retroactive antitrust liability for rates later declared unlawful would place carriers in a position of "great uncertainty." Carriers would never be able to rely on ICC approval of rates until all appeals on initial ICC decisions had been decided. Then, if such appeals resulted in the rates being declared unlawful, the carriers would be forced to pay treble damages even though the rates had been initially approved and they had been required to charge only those rates. We do not think that it was the goal of the ICA to trap carriers into such retroactive antitrust liability for engaging in conduct required by the ICA. The imposition of antitrust liability for this conduct would only frustrate the goal of the ICA.

759 F.2d at 1315 (citation omitted).

antitrust challenge, carriers would be faced with the Hobson's choice of withdrawing rates in order to minimize damages, thus losing needed revenue, or running the risk of increasing damages during the many years of litigation.[60] In cases such as this one or the *Iron Ore* cases, the duration of the allegedly excessive rates on which the damage actions are based would make withdrawal of rates a practical impossibility.

4. It is difficult, if not impossible, to disentangle rate issues from the underlying issue of the lawfulness of the ratemaking conduct. Where, as here, the liability issue turns on the construction of the rate bureau agreement (which is an ICC order) and ICC regulations, the risk of improper interference with the statutory scheme is increased significantly. What is alleged in an antitrust case as coercion that interferes with independent action may, upon analysis by the Commission under appropriate standards, turn out to be lawful. *See Cancellation Of Intermediate Routing, Michigan Northern Railway*, 365 I.C.C. 51, 76 (1981).[61] What is alleged to be a procedure

[60] The statutorily-limited suspension period favors "allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment." *Burlington Northern*, 459 U.S. at 141-42 (citations omitted).

[61] In *Michigan Northern*, the ICC held that carriers who responded to independent action by cancelling joint rates, thereby seriously jeopardizing the viability of the independent actor, had

unauthorized by a rate bureau agreement and subject to antitrust attack may turn out to be a procedure that receives Commission approval and therefore results in no loss of immunity. *See Canned Goods from Pacific Coast to Eastern Points*, 315 I.C.C. 769, 791 (1962) *and Pacific Paper Products, Inc. v. Garrett Freight Lines, Inc.*, 351 I.C.C. 309, 320 (1975).[62] What in truth resulted from a change of law, *Terminal Warehouse*, 297 U.S. at 505, or a good faith misinterpretation of an ICC order, *Wheat Rail*, 579 F. Supp. at 523, or a change in enforcement policy, *National Classification Committee v. United States*, 746 F.2d at 892, may not justify a change in the filed rates or the imposition of sanctions. *See supra* note 13.

However, if *Keogh* were overruled, there would exist powerful incentives to avoid the Commission's expertise by converting these same cases into private treble damage actions by a simple labelling device that applied legal conclusions or allegations of "willfulness" to mixed issues of law and fact otherwise within the jurisdiction of the ICC.[63] In these circumstances, the likelihood is great

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not been unlawfully coercive but had responded legitimately to retain business.

[62] In *Canned Goods*, the Commission held that alleged collaboration " 'outside the formal rate organization structure' " was permissible because it was "preliminary" to consideration of rate proposals under the approved procedures. 315 I.C.C. at 791-92. The issue in *Canned Goods* originated in an antitrust case challenging the unauthorized ratemaking as outside the immunity, but the claim was dismissed on the ground that the issue must be resolved by the Commission. *Luckenbach Steamship Co. v. United States*, 179 F. Supp. 605 (D. Del. 1959), *aff'd in relevant part per curiam*, 364 U.S. 280 (1960).

[63] The Commission's decisions on what constitutes improper rate bureau procedure and interference with independent action belie Petitioners' repeated references throughout their brief, and even in the question presented, to "knowing" violations in this case. These contentions are not to be found in any complaint allegation, an omission which reflects the fact that Petitioners' complaints repeat the allegations of the civil complaint filed by the Department

that courts and juries would reach conclusions on liability that would differ from what the Commission would conclude. Moreover, the Commission would lose the sole discretion to determine when, if ever, a rate bureau violation should affect the lawfulness of a filed rate or produce legally cognizable damages—a power that this Court specifically recognized with approval in *ATA*, 104 S. Ct. at 2468 n.13.

* * * *

In sum, the relationship between the antitrust laws and the national transportation policy reflected in the ICA has worked precisely as Congress envisioned. Throughout the history of the Interstate Commerce Act, the ratemaking powers delegated to the Commission have remained plenary as to motor carrier rates, and the filed rate doctrine has protected the ICA's standards and remedies from judicial interference. *Keogh* and *Georgia* stand as part of that doctrine and reflect the "plain repugnancy" between the comprehensive scheme of rate regulation and the antitrust damage remedy, as this Court has repeatedly recognized. *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 & n.29 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963).[64] Antitrust damage ac-

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of Justice, which was similarly silent on this point. The Antitrust Division's decision to proceed against Respondents with a civil case rather than a criminal prosecution after an eighteen-month grand jury investigation was consistent with its longstanding policy to forbear from criminal cases absent *knowing* violations of clear-cut rules. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 438-43 (1978). *See also Confirmation Hearing on William F. Baxter, Nominee, to be Assistant Attorney General—Antitrust Division, Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 12 (1981) (statement of William F. Baxter); Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405 (1978).

[64] The suggestion that *Keogh* and *Georgia* have been overtaken by the modern axiom that implied repeal is disfavored, Pet. Brief

tions based on filed rates would necessarily result in different sanctions and standards of rate lawfulness being applied, and would thereby subject carriers to inconsistent results and unpredictable procedures. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).[65] Whether labelled a "remedy limitation" or a "filed rate" doctrine, the *Keogh* and *Georgia* decisions were, and are, the correct ones.

III. IF THE LAW IS TO BE CHANGED, CONGRESS IS THE APPROPRIATE BODY TO CONSIDER THE POLICY ARGUMENTS ADVANCED HERE.

Congress, whose statutes were interpreted in *Keogh* and *Georgia*, has never uttered a word in disapproval of those decisions, despite their consistent application by the courts over time and the fact that Congress was plainly aware of them. *See Square D*, 760 F.2d at 1356-59, Pet. App. at 23a-26a. Moreover, Congress has had numerous opportunities to address *Keogh*, since it has considered transportation reform legislation several times during the past decade and has enacted five recent amendments to the ICA regulatory scheme.[66] Where Congress has

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at 10, is plainly wrong. Careful attention to this principle is reflected in this Court's 1907 *Abilene Cotton Oil* decision, cited in *Keogh*, 260 U.S. at 163, as well as in *Georgia*, 324 U.S. at 456-57.

[65] The Court in *Gordon* noted, in language equally applicable to this case, that "different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the [agency] must consider, in addition, the economic health of the . . . industry." 422 U.S. at 689.

[66] *See Square D*, 760 F.2d at 1355, Pet. App. at 15a. The acts are the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011; the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102.

taken an active role in a field and has acquiesced in long-standing judicial interpretation of a statute, this Court's consistent policy and practice has been to adhere to precedent. *See Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1726 n.18 (1985) (declining to abandon the implied antitrust immunity for state action "[a]fter over 40 years of Congressional acquiescence") *and Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (declining to reverse prior decisions implying an immunity for baseball even in the absence of any form of economic regulation). There is no reason to depart from that principle in this case.

Even though the rate regulatory scheme has not changed in any material respect, Petitioners and the Government argue that the ICC lacks the will or the funding to carry out the responsibility over rates entrusted to it by law. In response to this political issue, the Government does not ask Congress to underwrite the Commission nor to repeal *Keogh*.[67] Rather, it invites this Court to step in, overrule its determination of what Congress has done, and authorize the federal courts to fill in for the ICC. *See* U.S. Brief at 19-20 & n.24.

However, this Court does not, and should not, so lightly depart from the principles of *stare decisis*. If established precedent on an issue of statutory interpretation is to be

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[67] In connection with the high degree of legislative activity in transportation over the past decade, the Departments of Justice and Transportation and the ICC have presented their policy views to Congress on no fewer than 114 occasions, without ever asking that *Keogh* be overruled. *See* Appendix to Supplemental Brief of Respondents in Reply to the United States as Amicus Curiae. Not until September 1985 did the Executive Branch propose legislation that would repeal all ICC regulation of the rates of motor carriers of property. *See* Supplemental Brief of Respondents Informing the Court of a Recent Legislative Proposal. If such legislation were passed, *Keogh* would be a dead letter in the motor carrier field. Regardless of the fate of that legislation, however, the Government remains free to ask Congress to consider *Keogh* specifically.

changed after sixty years of consistent application by the courts, Congress has the "superior institutional competence" to gauge the impact of the change and to give proper weight to the wide-ranging political, social and economic consequences of such a policy reversal. *See Patsy v. Board of Regents*, 457 U.S. 496, 513-15 (1982) (refusing to overrule a prior statutory decision on the ground that legislation was the proper remedy). *See also id.* at 517 (White, J., concurring) (to overrule a statutory case, "a particularly strong showing is required that we have misread the relevant statute and its "history").

A retroactive reversal of the long-established remedy limitation in *Keogh* would raise a myriad of difficult political issues. For example, would a mere technical violation of a rate bureau agreement subject a carrier to the severe penalty of antitrust treble damages?[68] Should there be a phase-in period to allow carriers a period of adjustment and education, as Congress has provided in statutes such as the Motor Carrier Act of 1980?[69] Should the filed rate doctrine be overturned across all regulated industries? And would the new treble damage penalty be applied retroactively to carriers that acted long before the administration's change in attitude?

Resolution of such policy issues requires the type of political compromise, balancing and fine-tuning that are the traditional functions of the legislative branch, for sound reasons. As the Court noted in *Patsy*: "These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying,

[68] Under this Court's decision in *ATA*, the appropriate remedy for the violation of a rate bureau agreement depends on the severity of the violation, among other factors, and is left to the discretion of the ICC. 104 S. Ct. at 2466-68.

[69] That Act eliminated antitrust immunity for single-line rates, but set an effective date four years in the future. 49 U.S.C. § 10706(b)(3)(D) (1982). *See also Square D*, 760 F.2d at 1360 n.7, Pet. App. at 27a n.7.

and court-burdening litigation if answered incrementally by the judiciary . . . ." 457 U.S. at 514. If there are to be policy-driven changes in *Keogh* and the filed rate doctrine, these changes should be made by the political branch that has the governmental capacity to harmonize the interests and equities at stake.[70]

[70] As one court stated:

> The Department of Justice may well be dissatisfied with the balance drawn by Congress between competition and other aspects of the public interest. However, the remedy is not to seek judicial reinterpretation of statutory language . . . , but to seek from Congress amendment of the . . . statutory charter.

United States v. Civil Aeronautics Board, 511 F.2d 1315, 1323 (D.C. Cir. 1975). *Cf. Bankamerica Corp. v. United States*, 462 U.S. 122, 133 (1983) ("If changes in economic factors or considerations of public policy counsel the extension of the Clayton Act to the categories of interlocking directorates implicated here, it is a simple matter for Congress to say so clearly.").

CONCLUSION

Over sixty years of settled law precludes Petitioners' damage claims. *Keogh* and *Georgia* should not be overruled. If the historic accommodation between two statutory schemes is to be reconsidered, Congress is the proper body to balance the wide ranging political, social and economic consequences of such a change. This Court should affirm the decision below.

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APPENDIX A

The following statement amends the Rule 28.1 information contained in Appendix A to Respondents' Joint Brief in Opposition to the *certiorari* petition.

1. Bondy Cartage Limited is a wholly-owned subsidiary of Henry T. Bondy Holdings Limited, and is affiliated with Bondy Freight Lines, Inc. and Bondy Transfer, Inc.

2. Dominion-Consolidated Truck Lines Limited has changed its name to McCallum Transport Limited and Dominion-Consolidated Holdings Limited has changed its name to McCallum Holdings Limited.

3. As of December 30, 1985, Inter-City Truck Lines (CANADA), Inc. ("Inter-City") is a wholly-owned subsidiary of N.M. Davis Corp., Ltd. of Ontario, Canada. Inter-City owns 100% of the stock of Trans-Canada Truck Lines, Inc. However Inter-City anticipates that, in January 1986, pursuant to approval given by the Interstate Commerce Commission and Canadian authorities, 100% of the stock of Inter-City will be acquired by 141622 Canada, Inc., a wholly-owned subsidiary of Reimer Express Enterprises Ltd. of Winnipeg, Manitoba, Canada. Reimer Express Enterprises Ltd. also owns 90% of the stock of Reimer Express Lines, Ltd. and of Jamesville Enterprises Ltd., which owns 100% of the stock of Canadian Great Western Express Ltd.

APPENDIX B

STATUTE INVOLVED (1966—JULY 1980)

There are three versions of the Interstate Commerce Act ("ICA") provisions governing motor carrier rates that have been in effect during the 1966-1981 time period covered by the complaints. First, the statute as it existed from 1966 until 1978 was codified at 49 U.S.C. § 1 *et seq.* and was most recently included in the 1976 edition of the United States Code. The second is the recodified version of the statute, which Congress enacted *"without substantive change"* in 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978) (emphasis added). The third relevant version incorporated the substantive amendments of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, which were effective as of July 1, 1980 and are codified in the 1982 edition of 49 U.S.C.

This Appendix B excerpts from the 1982 code those provisions of the ICA that governed motor carrier rates *prior* to the 1980 amendments. Since the 1982 code used here and in the brief reflects the 1978 recodification, the provisions reproduced below differ significantly in organization and language from the statute as it was codified prior to 1978, but, as noted, Congress intended *no substantive change* in the recodification. In addition, it should be noted that there are some minor variations in numbering and language between the 1978 recodification and the 1982 version used here that resulted from subsequent amendments. However, the provisions set forth below reflect the *substance* of the statute as it related to motor carrier rates during the period 1966 to July 1980.

Those provisions that were substantively amended by the 1980 Act are designated by an asterisk, and the post-1980 version is reproduced in Appendix C.

The following excerpts from the 1982 version of 49 U.S.C. are relevant to the 1966-July 1980 time period:

§ 10101. Transportation policy [formerly preceding 49 U.S.C. § 1 (1976)]*

(a) . . . to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

* * * *

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10701. Standards for rates, classifications, through routes, rules and practices [formerly 49 U.S.C. § 316(b), (d) (1976)]*

(a) A rate, . . . classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier) must be reasonable. Divisions of joint rates by those carriers (including rail carriers) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

* * * *

§ 10704. Authority and criteria: rates and classifications, rules, and practices prescribed by Interstate Commerce Commission [formerly 49 U.S.C. § 316(e), (i) (1976)]

(b) (1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

* * * *

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2) (A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

* * * *

(3) If the carrier is a motor or water common carrier or a freight forwarder, the Commission shall also consider the need, in the public interest, of adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of freight forwarding, respectively.

* * * *

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a carrier may not be maintained at a particular level to protect the traffic of another mode of transportation.

* * * *

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be an extension of a complaint pending before the Commission. A complaint

under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

* * * * *

§ 10706. Rate agreements: exemption from antitrust laws [formerly 49 U.S.C. § 5b (1976)]*

* * * * *

(b)(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Comission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

* * * * *

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

* * * * *

§ 10708. Investigation and suspension of new non-rail carrier rates, classifications, rules, and practices [formerly 49 U.S.C. §§ 15(7), 316(g) (1976)]

(a)(1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when—

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or

(B) a new reduced rate or rule or practice that causes a reduction of a rate is filed with

the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule, or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practice goes into effect), as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(b) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final action, it may require the carrier to refund, with interest, to the persons on whose behalf those amounts were paid, the part of the increased rate found to be in violation of this subtitle.

(c) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall give proceedings under this section preference over all other proceedings related to that type of carrier pending before it and make its decision at the earliest practical time.

* * * *

§ 10741. Prohibitions against discrimination by common carriers [formerly 49 U.S.C. §§ 3(1), 316(d) (1976)]

* * * *

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

* * * *

§ 10761. Transportation prohibited without tariff [formerly 49 U.S.C. § 317(b) (1976)]

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allow-

ing the use of a facility that affects the value of that transportation or service, or another device.

* * * *

§ 10762. General tariff requirements [formerly 49 U.S.C. §§ 317(a)-(c), 318(a) (1976)]

* * * *

(a) (1) . . . A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.

* * * *

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

* * * *

(c) (1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice the carrier shall publish, file, and keep open for public

inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

* * * *

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. . . . [A] proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section.

* * * *

§ 11701. General authority [formerly 49 U.S.C. §§ 13(1), 304(c), 316(e) (1976)]

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action.

* * * *

§ 11705. Rights and remedies of persons injured by certain carriers [formerly 49 U.S.C. §§ 9, 16, 304a (1976)]

* * * *

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title.

* * * *

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) . . . A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under subsection (b) (3) of this section by filing a complaint with the Commission under section 11707(b) of this title.

* * * *

§ 11706. Limitation on actions by and against common carriers [formerly 49 U.S.C. § 304a (1976)]

* * * *

(c) (2) A person must begin a civil action to recover damages under section 11705(b) (3) of this title within 2 years after the claim accrues.

* * * *

§ 11903. Rate, discrimination, and tariff violations [formerly 49 U.S.C. § 41(1) (1976)]

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means

transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but no more than $20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or an officer, director, receiver, trustee, lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under that chapter, that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but no more than $20,000, imprisoned for not more than 2 years, or both.

* * * *

APPENDIX C

STATUTE INVOLVED (JULY 1980—PRESENT)

This Appendix C contains the relevant provisions of the Interstate Commerce Act that were amended by the Motor Carrier Act of 1980, as set forth in the 1982 Code. Except as set forth here, all of the provisions reproduced in Appendix B remained in effect after July 1980.

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (C) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation . . . .

* * * * *

§ 10701. Standards for rates, classifications, through routes, rules, and practices

* * * * *

(e) In proceedings to determine the reasonableness of rate levels for a motor carrier or group of motor carriers, or in proceedings to determine the reasonableness of a territorial rate structure where rates are proposed through agreements authorized by section 10706(b) of this title, the Commission shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses, including the opera-

tion of leased equipment and depreciation, plus a reasonable profit. The standards and procedures adopted by the Commission under this subsection shall allow the carriers to achieve revenue levels that will provide a flow of net income, plus depreciation, adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, attract and retain capital in amounts adequate to provide a sound motor carrier transportation system in the United States, and take into account reasonable estimated or foreseeable future costs.

* * * *

§ 10706. Rate agreements: exemption from antitrust laws

* * * *

(b)(1) In this subsection, "single-line rate" refers to a rate, charge, or allowance proposed by a single motor common carrier that is applicable only over its line and for which the transportation can be provided by that carrier.

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

* * * *

(3)(D) No agreement approved under this subsection may provide for discussion of or voting upon single-line rates on or after January 1, 1984, except that such date shall be July 1, 1984, if the Motor Carrier Ratemaking Study Commission does not submit its final report under section 14(b)(4) of the Motor Carrier Act of 1980 on or before January 1, 1983.

* * * *

(e) The Commission may require an organization established or continued under an agreement approved under this section to maintain records and submit reports. The Commission, or its delegate, may inspect a record maintained under this section.

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

* * * *

No. 85-21 (18)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' OPPOSITION TO THE MOTION OF NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND THE REGULAR COMMON CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

Page

Interstate Commerce Commission v. American Trucking Associations, Inc., 104 S.Ct. 2458 (1984) 3

IN THE

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Pursuant to Rule 36.3 of the Rules of the Supreme Court, petitioners oppose the Motion of National Motor Freight Traffic Association, Inc. and the Regular Common Carrier Conference for Leave to File Brief

as *Amicus Curiae* in Support of Respondents and request that the motion be denied. The grounds for this opposition are two-fold:

1. The entities proffering the *amicus* brief are essentially the alter ego of respondents and the proffered brief represents a transparent attempt to reinforce respondents' brief on the merits by adding redundant material which exceeds the Court's page limitations.

2. With reference to Rule 36.3, the proffered *amicus* brief would not set forth facts or questions of law that have not been or will not be adequately presented by the parties, especially in light of the alter ego relationship between respondents and *amici*.

I. The Proffered Amicus Brief Represents An Attempt To Exceed Page Limitations By Adding A Redundant Brief To The Record

Supreme Court Rule 34 imposes a 50-page limit on a brief on the merits. The brief of respondents is 48 pages long. The challenged *amicus* brief is 22 pages long. The *amicus* brief nominally propounds the views of the National Motor Freight Traffic Association, Inc. (NMFTA) and the Regular Common Carrier Conference (RCCC). *Each* of the motor carrier respondents in this matter is a member of the National Motor Freight Traffic Association.[1] *Moreover, each of the respondent motor carriers has appointed the NMFTA as its agent for the very tariff filings which are said by the NMFTA to justify its filing.*

[1]In preliminary discovery proceedings in this action, a representative of each defendant carrier confirmed this affiliation at his deposition.

Counsel for the NMFTA is the firm of Rea, Cross & Auchincloss at One Thomas Circle, N.W., Washington, D.C. Counsel for the respondent Niagara Frontier Tariff Bureau is the firm of Rea, Cross & Auchincloss at One Thomas Circle, N.W., Washington, D.C.

Amicus RCCC is an affiliated conference of the American Trucking Associations, Inc., an organization to which defendants belong and to whose tariffs the respondents are subscribing members. Once again, an agency relationship exists, this time between the respondents and the American Trucking Associations, Inc. As noted in the *amici*'s moving papers, RCCC members participate in collectively established classifications in the National Motor Freight Classification and in the collectively established rates in the tariffs of one or more of the ten major rate bureaus including respondent Niagara Frontier Tariff Bureau.

The Court also may wish to note that in *Interstate Commerce Commission, et al. v. American Trucking Associations, Inc., et al.*, 104 S.Ct. 2458 (1984) decided June 5, 1984, the parties to the proceeding included respondent Niagara Frontier Tariff Bureau, Inc. and American Trucking Associations, Inc., RCCC's parent affiliate. Counsel in the *ICC* case for both the ATA and the Niagara Frontier Tariff Bureau, Inc. once again was the firm Rea, Cross & Auchincloss.

In short, there appears to be a near complete identity of interest between respondents and *amici* as well as a direct agency relationship. The same parties, in effect, are attempting to file two briefs.

II. The Proffered Amicus Brief Does Not Represent The View Of An Entity Whose Views Have Not Been Adequately Represented Or Previously Presented By The Parties

Amici cannot meet the test of Rule 36 that the Motion for Leave to File a Brief set forth facts or questions of law that have not been or will not be adequately presented. Indeed, the headnotes in the table of contents and the authorities cited by NMFTA and by respondents in their brief display substantial overlap. Both arguments which NMFTA wishes to assert, 1) that the filed rate doctrine bars recovery of antitrust damages and 2) that shippers have adequate remedies under the Interstate Commerce Act, are fully encompassed within the arguments already presented by the respondents. Thus, the proffered *amicus* brief plays no legitimate role in presenting pertinent arguments which other parties have failed to address. Rather, the proffered brief seeks to add additional weight to previously presented arguments by presenting these arguments in cumulative fashion.

For the above reasons, the Motion for Leave to File should be denied.

Respectfully submitted,

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No. 85-21

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25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	i
I. Recovery Of Damages From Companies Which Violate Both ICC Regulations And The Antitrust Laws Does Not Infringe Upon A Regulatory Plan	3
II. Petitioners Did Not Receive The Rate Protection To Which They Were Entitled	5
III. A Holding That *Keogh* Does Not Immunize Conduct Which Violates A Regulatory Plan Would Pose No Penalty For Carriers Which Comply With Federal Statutes And Regulations	7
IV. Plaintiffs Seek To Recover For Damages Computed According To Accepted Principles of Calculation Under The Antitrust Laws	10
V. The Reed-Bulwinkle Act Of 1948 Granted Express And Limited Immunity Which Obviated And Supplanted The Respondents' Need For *Keogh* Doctrine Protection	11
VI. The *Carnation* Decision Recognizes That Implied Immunity No Longer Applies When Express Statutory Immunity Is Granted	14
VII. The Filed Rate Doctrine Should Not Apply To Affirmatively Fraudulent Conduct Which Violates *Both* The Regulatory Plan And The Antitrust Laws	15
VIII. The Brief of *Amici* American Information Technologies Corp., *et al.*, Poses An Artificial Question And The Brief Is Not Entitled To Any Weight	16
IX. Respondents Were Not Entitled To Rely On *Keogh* As A Basis For Secret Cheating On A Regulatory Plan And, Accordingly, Public Policy Should Not Insulate Them From Recompensing Victims Through Prospective Overruling	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 15

Arrow Transportation Co. v. Southern Railway, 372 U.S. 658 (1963) 15-16

Canter v. Detroit Edison Co., 428 U.S. 579 (1976) 6

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 4, 10, 14, 15, 19

City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) 4

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 3

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 3

Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922) ..... *passim*

Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) 4

MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983) 4

In re Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235 (S.D.N.Y. 1980) 10

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 6

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 3

Southern Motor Carriers Rate Conference v. United States, 105 S.Ct. 1721 (1985) 19

Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 15

In re Wheat Rail Freight Rate Antitrust Litigation, 759 F. Supp. 1305 (7th Cir. 1985) 17, 18

Table of Authorities Continued

Page

STATUTES:

Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 *et seq.* ..... *passim*

Sherman Act, 15 U.S.C. §1 *et seq.* ..... *passim*

Shipping Act of 1916, 46 U.S.C. App. (Supp. I) §801 *et seq.* 14, 15

49 U.S.C. §11916 5

MISCELLANEOUS:

S. Rep. No. 44, 80th Cong., 1st Sess. (1947) 13

H.R. Rep. No. 1100, 80th Cong. 1st Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News, 1844 ..... 8, 9, 13, 15

93 Cong. Rec. A3969 (1947) 9

Brief for the United States as *Amicus Curiae, In re Wheat Rail Freight Rate Litigation*, 759 F.2d 1305 (7th Cir. 1985) 17, 18

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REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Respondents assert that permitting shippers to maintain an antitrust action to recover damages for price fixing conspiracies outside of the confines of the Interstate Commerce Act somehow would constitute judicial interference with the Act. If respondents' fallacious argument were accepted, shippers who are entitled to protection against excessive rates would be unable to recapture overcharges resulting from

activities designed to deprive the shippers of the statutory protection to which they are entitled. Pious assertions by tortfeasors about the need to protect the integrity of a regulatory plan are unconvincing since permitting shippers to recover for illegal overcharges would not frustrate the integrity of the regulated plan but contribute to it.

Respondents also dispute that the protection for joint rate-setting permissible under the Interstate Commerce Act depends upon compliance with the statute which affords them an exception to the Congressionally mandated policy of open price competition. Not only do the respondents deny the *quid pro quo* of compliance with a regulatory plan in order to obtain its benefits, but they fail to offer any reason why public policy should not require that those who intentionally violate a regulatory plan be answerable under the prevailing laws of the United States for such unapproved or unauthorized conduct.

Respondents suggest that because the United States may bring a criminal case or a civil action to enjoin continuing violations damage actions are not necessary to deter regulatory violations.[1] This argument

[1] Recovery under the antitrust laws for illegal overcharges is available in both regulated and non-regulated industries even though the United States may file civil or criminal actions relating to the same activities. Dual liability serves two salutory purposes. Prosecution by the government is necessary to enforce the laws of the United States and to insure compliance with them. The availability of complementary damage actions by persons injured by illegal conduct compensates the victim and helps to prevent unjust enrichment of the conspirators. Congress intended that government and private actions be mutually reinforcing.

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to anyone contemplating business behavior in violation of the antitrust laws.

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). *See also Illinois Brick Co. v. Illinois.*, 431 U.S. 720, 746 (1977), which refers to the legislative purpose in creating private rights to enforce the antitrust laws:

> But § 4 [of the Clayton Act] has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality," *Hanover Shoe,* 392 US at 494; it is also designed to compensate victims of antitrust violations for their injuries.

assumes that the carriers should be permitted to retain significant sums collected pursuant to an illegal endeavor and that the victims of the conspiracy should suffer economic loss.

Even more remarkable is the respondents' attempt to speak on behalf of an agency they have defrauded, when the agency itself is represented in these proceedings and has disclaimed any adverse effect on its operations from permitting injured shippers to recover damages.

I. Recovery Of Damages From Companies Which Violate Both ICC Regulations And The Antitrust Laws Does Not Infringe Upon A Regulatory Plan

Respondents' assertion that permitting shippers to maintain damage actions against carriers for conduct which Congress has forbidden would constitute the substitution of a court's judgment for that of the ICC is erroneous in several respects. First, of course, the damages would relate to conduct which the ICC had no authority to permit (such as the coercive suppression of the right of competing carriers to file inde-

pendent tariffs or respondents' surreptitious price manipulations which the ICC never had an opportunity to review).

Second, permitting damages based on *past* conduct does not conflict with the ongoing regulatory function of a transportation agency. This Court has held that:

> The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission.

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222 (1966).

Third, it has been held repeatedly that conduct which violates a regulatory plan already is subject to antitrust damage actions when such suits are brought by competitors. *See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984); *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). The maintenance of such suits has had no adverse effect on either the public interest or on the operations of the interested regulatory agency. If suits by competitors flowing from illegally derived tariffs do not infringe a regulatory plan, then neither would similar suits by customers of regulated entities. The economic determinations necessary to fix the amount of damages in actions brought by customers will be similar to the determinations made in actions brought on behalf of competitors of the regulated entities.

Fourth, and most persuasive, the ICC itself has disclaimed any adverse effect on its regulation if the shippers' suits are allowed to proceed.

> The availability of private damage actions would in fact *further the regulatory objectives of* both the Sherman Act and *the Interstate Commerce Act*. (Emphasis added.)

Brief for the United States as *Amicus Curiae* Supporting Petitioners, p. 6, signed by the ICC and the Department of Transportation.

II. Petitioners Did Not Receive The Rate Protection To Which They Were Entitled

Respondents argue that because they charged the "legal" rate, they charged a fair rate. They ignore the fact that the rates they charged became the so-called "legal" rates only because the carriers duped the ICC. When the setting of a rate violates the Sherman Act and the Interstate Commerce Act, the filed rates should be considered illegal rather than legal.[2]

On page 11 of their Brief, respondents seek to characterize the petitioners' complaints as nothing more than dissatisfaction with the "fair rates guaranteed [the shippers] by the ICA." But the petitioning shippers never had the protection of "fair" rates guaranteed by the ICA precisely *because* respondents subverted the statute.

---

[2] As used in the Interstate Commerce Act, 49 U.S.C. §11916, the term "legal" rate merely describes approved rates which carriers subscribing to a tariff must charge. It is equivalent to a "published" or a "filed" rate, but the fact that these rates are being collected does not mean that carriers should not be liable for damages occasioned by their fraudulent filings.

Likewise, the carriers' argument on page 11 that when shippers paid the secretly rigged rates they received ". . . exactly what they were entitled to under the ICA—rates governed by the statutory standards of the Act" is thoroughly defective. The shippers did not receive the rates to which they were entitled under Congress's regulatory design because the rates which these carriers charged were set in deliberate contravention of the standards of the Interstate Commerce Act. And since it was because of the calculated conduct of the respondent carriers that the ICA standards were not applied, it would be unjust for the carriers to profit by their violations at the shippers' expense.

The Court should note that in pursuing the argument that the ICC required respondents to charge the rates which they themselves had caused to be effective,[3] these respondents avoided any reference to this Court's holdings in *Canter v. Detroit Edison Co.*, 428 U.S. 579 (1976), discussed in petitioners' Brief, pp. 39 and 40, and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), cited by the United States. In those cases the Court permitted plaintiffs who paid regulated rates to maintain suits under the

[3] As noted in the Brief for Petitioners, page 14, proposed tariffs become effective 30 days after filing unless the ICC suspends them. The statistics show that the ICC simply cannot police effectively the volume of filings submitted to it. The Brief *Amicus Curiae* for the United States and the ICC confirmed that budgetary restrictions have impeded its ability to review tariffs to the extent that 99% of new rate filings go into effect automatically. The ICC is on record in this very action as supporting the antitrust damage remedy as a useful adjunct to its responsibility to prevent collusive and excessive rates from taking effect.

antitrust laws when those rates were the product of tariff filings made in connection with Sherman Act violations.

III. A Holding That *Keogh* Does Not Immunize Conduct Which Violates A Regulatory Plan Would Pose No Penalty For Carriers Which Comply With Federal Statutes And Regulations

Respondents' argument that the intended purpose of the *Keogh* doctrine is to prohibit judicial interference with ICA-regulated rates represents an attempt to misstate the question pending before the Court.[4]

[4] In addition to trying to change the issue presented, respondents attempt to overcome the allegations of the complaints, even though these allegations must be accepted for purposes of their motion to dismiss. In their counterstatement of the case, footnote four of their Brief, respondents state that they are not charged with "willful" or "knowing" violations of the Interstate Commerce Act even though the complaint alleges that the respondent carriers secretly set prices and threatened and coerced other carriers to refrain from posting lower rates. Not only were the violations both knowing and willful, but any suggestion that the respondents are the hapless victims of some technical dispute involving arcane regulations cannot be squared with the plain language of the complaint.

Respondents also transgress the ground rules pertaining to their own motion on page 41 of their Brief with the erroneous assertion that in this action "the liability issue turns on the construction of the rate bureau agreement. . . ." Respondents know better. The complaints allege conduct in clear violation of the NFTB rate agreement as well as conduct which the ICC is prevented by statute from approving. ICC construction of the agreement is not at all necessary to establish that price fixing by a secret "Principals Committee," undisclosed in the rate bureau agreement and unauthorized by the ICC, violates the law. Nor is any ICC construction necessary to determine that coercive suppression of independent rate filings in calculated defiance of

Petitioners do not claim that rates set in accordance with ICC procedures and approved by the agency are subject to antitrust damage claims.[5] The overcharges in question are the product of a secret and unauthorized pricefixing conspiracy and cannot be equated with rates approved by the ICC in compliance with its regulations and which are not challenged herein.

Conspiratorial rates do not represent rates set through proper application of agency expertise. Through respondents' design, the ICC has been deprived of the statutorily mandated opportunity to obtain the views of either shippers or would-be competitors of the respondents so that the application of a national transportation policy, receptive to both shippers' and carriers' interests, has been frustrated.

The House Report on the Reed-Bulwinkle Act states that the Interstate Commerce Commission may

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the Reed-Bulwinkle Act constitutes unauthorized conduct which is not entitled to antitrust exemption.

[5] Likewise, in their *Amicus* Brief, the regional telephone companies distort the question before the Court. The issue according to the telephone companies is:

> Should the Court create a new class of lawsuits--treble damage actions by customers of federally regulated public entities who complain about the rates they are charged under effective tariffs?

The telephone companies surely understand that the question they pose is spurious and that petitioners have not attacked the principle that public utility rates may be set by federally regulated agencies pursuant to a statutory plan. The question involved is that of damages occasioned by conspiratorial circumvention of the regulatory plan and not a complaint about rates charged under tariffs filed in compliance with the regulatory plan.

approve rate bureau agreements if it "finds that, by reason of furtherance of the national transportation policy declared in the Interstate Commerce Act there should be relief from the antitrust laws."[6] The Report goes on to state that "the question as to whether or not an agreement is to be approved involves the accommodation and comparative evaluation by the Commission of two policies, the one, the national transportation policy, the other, the antitrust laws." H.R. Rep. at 1856. The Congressional intent that the Commission be able to make a comparative evaluation of the anticompetitive consequences of a rate bureau agreement or tariff is frustrated when secret conspiratorial activities deny the ICC the opportunity of fair evaluation.

Representative Bulwinkle himself explained that public involvement in all aspects of collective ratemaking was an essential ingredient of the antitrust immunity provisions being fashioned by Congress. He said:

> I read the other day the astonishing statement that 'the bill permitted carriers to get together in secret some dark night.' Needless to say this is absolutely incorrect. The bill provides *for complete publicity at every conference to protect the rights of the public*. 93 Cong. Rec. A3969 (1947) (extension of remarks, emphasis added).

The respondent carriers did exactly what Representative Bulwinkle said was forbidden. They convened in secret to fix rates and coerce would-be competitors

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[6] H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News, 1844.

into withholding lower rate filings. Holding respondents responsible for this illegal conduct does not remove the immunity afforded ratemaking activity which is in compliance with the Act.

IV. Plaintiffs Seek To Recover For Damages Computed According To Accepted Principles Of Calculation Under The Antitrust Laws

Contrary to the assertion of respondents and certain *amici*, it is not at all necessary to recalculate each illegal rate pursuant to ICC procedures in order for petitioners to recover. The claim herein is one for damages under the antitrust laws, not for reparations. The measure of those damages is the difference between the conspiratorial rates actually charged and the competitive rate levels which would have been paid but for the illegal conspiracy. This type of calculation has been made in hundreds of antitrust cases affecting a wide variety of industries.[7]

A presumption should apply that competitive rates, credibly established through expert testimony, are within a zone of reasonableness. First, competitive rates are rates at which efficient carriers would earn a positive and non-predatory return and thus would qualify as reasonable. Second, carriers who subvert a regulatory plan should not be given an opportunity to invoke the same regulatory rules they have circumvented to reduce their liability. Any burden of showing that lower competitive rates would have been

[7] These include damage actions in regulated industries in actions brought by competitors; by shipper plaintiffs in *Carnation;* and by shipper plaintiffs in *In re Ocean Shipping Antitrust Litigation,* 500 F. Supp. 1235 (S.D.N.Y. 1980), recently settled. The trucking industry is hardly so unusual as to require a special method of calculating damages.

rejected by the ICC as unreasonably low should be borne by the party who violated the law and that burden should be a heavy one.[8]

In footnote 36 of their Brief, respondents refer to a number of government-originated antitrust actions relating to regulated industries for the proposition that government enforcement has been successful in curtailing regulatory abuse and, therefore, regulated entities do not need to face antitrust damage actions as an additional incentive to comply with the law. The cases cited (and additional cases brought by the government in regulated industries other than transportation) equally well support the proposition that massive violations of regulatory statutes occur with dismaying regularity. If the economic rewards which can be obtained through violating both a regulatory statute and the antitrust laws are large enough so that the violators are able to retain substantial illegal overcharges, it appears that the threat of government action, and particularly civil injunctive action, has been insufficient to deter illegal conduct. The threat of antitrust damage suits will assist in forestalling potential conspirators.

V. The Reed-Bulwinkle Act of 1948 Granted Express and Limited Immunity Which Obviated And Supplanted The Respondents' Need for Keogh Doctrine Protection

Petitioners argue that *Keogh* and the Reed-Bulwinkle Act addressed two different problems and that

[8] Moreover, in the highly unlikely event this burden is met, the damages then would be calculated as the difference between the *lowest* reasonable (i.e., non-predatory) rate levels and the rate levels obtained through the conspiracy.

Keogh does not immunize conduct but restricts the remedy available under the antitrust laws. In contrast to the issue presented in *Keogh*, the focus of the Reed-Bulwinkle Act, according to respondents, was to protect rate bureaus from criminal prosecutions. This construction of Reed-Bulwinkle is at plain odds with the language of the statute which grants a *limited express* immunity from the antitrust laws. The statute carefully spells out the immunity being granted and conditions that immunity upon compliance with the regulatory plan.

In essence, the respondents imply that immunity from treble damages under *Keogh* is not inconsistent with different limitations Congress placed on express immunity under the Reed-Bulwinkle Act. The basis of this argument is a supposition that the Reed-Bulwinkle Act protects against criminal and injunctive actions and not against treble damage actions which instead are foreclosed by *Keogh*. This view is incorrect. If *Keogh* is overruled, carriers nevertheless will be immune from treble damage actions under the immunity granted in the Reed-Bulwinkle Act *if* they meet the Act's requirements. Undoubtedly, carriers will continue to claim such statutory immunity from private damage actions for conduct which complies with Reed-Bulwinkle. The Act thus grants a comprehensive exemption for approved conduct which immunizes such conduct from both government prosecution and private damage actions. Accordingly, it supplanted the need for judicially implied immunity required in the *Keogh* situation.

The Court should note that respondents have made a misleading omission in quoting from the legislative history of the Reed-Bulwinkle Act by placing a period

after a *portion* of the Reed-Bulwinkle legislative history being quoted. Brief for Respondents, p. 29.[9] As a result of this deletion, they describe the House and Senate Reports as stating (albeit ambiguously) that the bill lets the antitrust laws apply with full force so far as they now are applicable.[10] Respondents' placing of the period at this point eliminates the exception clause which indicates that the *only* joint agreements among carriers being removed from the operation of the antitrust laws (including damage provisions) were agreements approved by the ICC based on its findings that antitrust relief should be granted. Proper reference to the exception clause indicates that unapproved or unauthorized conduct remained subject to the antitrust laws. Otherwise, the exception clause with its limitations would be superfluous. Brief for the Petitioners, pp. 24, 25.

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[9] The full text of the quotation is:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, *except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that the object of the agreement is appropriate for the proper performance by the carriers of service to the public, that the agreement will not unduly restrain competition, and that it is consistent with the public interest as declared by Congress in the national transportation policy.* (Emphasis added on omitted portion.)

S. Rep. No. 44, 80th Cong., 1st Sess. (1947) at 7-8. The language of the exception clause in H.R. Rep. No. 1100 is quoted at Brief for the Petitioners, p. 24.

[10] Even this language most logically means that the antitrust laws apply to non-exempt or unapproved conduct.

VI. The *Carnation* Decision Recognizes That Implied Immunity No Longer Applies When Express Statutory Immunity Is Granted

Respondents argue that the Court's ruling in *Carnation* that

> The creation of an antitrust exemption for ratemaking activities which are lawful under the Shipping Act implies that unlawful ratemaking activities are not exempt.[11]

Carnation at 216, should not apply with respect to the Reed-Bulwinkle exemption. However, the principle of law enunciated by the Court in *Carnation* is fully applicable to the instant situation, and that principle has been reaffirmed by the Court on numerous occasions.

Respondents' argument rests on the premise that the regulatory plan of the Interstate Commerce Act and the Shipping Act are somewhat different in application. The legislative history of the Reed-Bulwinkle Act, however, refers specifically to Section 15 of the Shipping Act as a direct precedent for granting antitrust immunity to ICC-regulated carriers who operate within the confines of approved rate bureau

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[11] With respect to respondents' argument that any and all relief for activities *outside* of the Interstate Commerce Act depends upon resort to the ICC, the Court noted in *Carnation* at 224:

> The rights which petitioners claim under the antitrust laws are entirely collateral to those which petitioners might have sought under the Shipping Act.

When, as a practical matter, no relief is available from the ICC, it is only proper that injured parties be allowed to pursue alternate remedies granted to them by Congress.

agreements. H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News 1844 at 1848 and 1849. Since Congress itself likened its extension of immunity in Reed-Bulwinkle to the type of immunity that was conferred by the Shipping Act, the holding in *Carnation* that unauthorized price fixing is subject to claims for redress from injured shippers applies with full force in this action.

VII. The Filed Rate Doctrine Should Not Apply To Affirmatively Fraudulent Conduct Which Violates *Both* The Regulatory Plan And The Antitrust Laws

Respondents argue that the filed rate doctrine through which the reasonableness of rates is measured by an expert agency should serve to prevent recovery of damages flowing from rates which were set in defiance of a regulatory plan and the antitrust laws. This Court has never agreed with the premise that conduct fraudulent on its face, indeed, conduct which constitutes a felony offense under the Sherman Act, is entitled to the protection of the filed rate doctrine. *See, Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). The result of such a holding would be to penalize shippers and to unjustly enrich carriers who successfully avoid agency review of their conduct.

Respondents cite a number of cases for the general proposition that a regulatory agency rather than a court should assume jurisdiction over rate-related disputes. Prior considerations of the filed rate doctrine, however, primarily involve disputes of statutory or regulatory interpretation. The regulatory uniformity which respondents claim is crucial to the filed rate doctrine, *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), *Arrow Transportation*

Co. v. Southern Railway, 372 U.S. 658 (1963), would not be impaired by leaving unapproved or unauthorized conduct subject to the ordinary application of the antitrust laws. Permitting shippers to recover for injuries inflicted *outside* of a regulatory scheme does not impinge upon either regulatory uniformity or an agency's exercise of its expertise.

Moreover, the ICC itself has denied that there is any infringement of its regulatory authority when damage claims are asserted for unapproved and unauthorized conduct. Brief for the United States as *Amicus Curiae*, p. 19. Indeed, there is a notable irony in having respondents, who subverted a regulatory plan, advance the proposition that requiring them to answer for damages they inflict would be inconsistent with the regulatory process.

VIII. The Brief of *Amici* American Information Technologies Corp., *et al.*, Poses An Artificial Question And The Brief Is Not Entitled To Any Weight

As noted, the telephone companies have attempted to distort the pending question by transposing it into a claim which is not being asserted. As *amici* and respondents know full well, neither petitioners (nor anyone else to their knowledge) intend to premise antitrust actions on *lawful* ratemaking activities (whether or not customers in regulated industries are dissatisfied with the rates which a commission has approved).

In addition to this threshold defect, the weight and credibility to be given to the brief as *amicus curiae* of the former AT&T system companies may be questioned if statements made by its principal signatory and counsel of record, J. Paul McGrath, are compared with statements he made while serving as Assistant

Attorney General in charge of the Antitrust Division. On June 26, 1984, Mr. McGrath was the principal signatory of a brief of the United States as *amicus curiae* in the *Wheat Rail Freight Rate Antitrust Litigation* appeal then pending before the court of appeals for the Seventh Circuit.

In his present *Amicus* Brief herein on behalf of the telephone companies at page 6, Mr. McGrath opines:

> In particular, Congressional action in passing the Reed-Bulwinkle Act and the Motor Carrier Act of 1980 more likely evidence acquiescence in, or ratification of, *Keogh*, than an intent to overrule it.

This argument may be contrasted with Mr. McGrath's immediately prior statement when he was employed by the United States in a policy-making capacity that:

> In this case [Wheat Rail Freight], however, it is not necessary to rely merely on general principles because, although the Reed-Bulwinkle Act expressly permitted collective rate-setting by carriers, *both the text of the Act and its legislative history make it clear that the scope of antitrust immunity for such activity was limited*, and that, in order to qualify for such immunity, carriers must operate in strict compliance with an ICC-approved rate bureau agreement. (Emphasis added.)

Likewise, the Court may wish to contrast Mr. McGrath's present argument, *Amicus* Brief, p. 6, that:

> Creating a treble damage action for users of federally regulated services would have a

> substantial negative impact on the regulatory process itself and on federally regulated firms.

with his statement at page 41 in the *Amicus* Brief for the *Wheat Rail Freight Rate Litigation* that:

> At a more general level, the thrust of the district court's reliance analysis contravenes the principle that antitrust immunities should be implied only in narrow circumstances, after clearly enunciating how the regulated entity is subjected to conflicting requirements, or how the statutory schemes clash in other ways. The court below failed to explain in any coherent manner how "the role of the ICC" would be "severely restricted." Imposing antitrust damage liability in cases of this sort would not deter carriers from filing rates with the ICC as required by law. And the ICC certainly has no regulatory obligation to protect carriers who fail to comply with statutory requirements.

IX. Respondents Were Not Entitled To Rely On *Keogh* As A Basis For Secret Cheating On A Regulatory Plan And, Accordingly, Public Policy Should Not Insulate Them From Recompensing Victims Through Prospective Overruling

Respondents' final argument is that they should be permitted to keep their illegal gains because an overruling of *Keogh* should be done through special legislation or limited to prospective relief only. Their plea to keep these overcharges should be rejected on several grounds.

Respondents were not acting in good faith reliance on a regulatory interpretation which they thought

complied with Congressional intent when they conspired to avoid the regulatory plan. They knew that their actions were in flagrant violation of both the antitrust laws and the Reed-Bulwinkle Act—and they took pains to conduct their conspiracy in secret. Unlike the situation in the *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985), which respondents cite, there has been no acquiescence, either by the ICC or by the judiciary, in the unlawful conduct.

Second, in 1948, Congress announced the conditions upon which carriers could obtain immunity when it passed the Reed-Bulwinkle Act. In the 1966 *Carnation* case, this Court specified that carriers are liable for antitrust damages to injured shippers for activities which do not comply with conditions for obtaining regulatory immunity. Respondents have had ample notice that they would not be entitled to immunity for unauthorized conduct.[12] It is contrary to public policy to reward or encourage knowing violations of the laws of the United States and no colorable argument can be or has been made that respondents believed that the anticompetitive activities challenged herein were protected by Congressional legislation.

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[12] In its occasional references to *Keogh* since Reed-Bulwinkle was enacted in 1948, the Court has never acquiesed in conduct alleged herein nor given any indication that violations of both the ICA *and* the Sherman Act are immune from recovery of damages.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with directions that petitioners' complaints be reinstated in their entirety.

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No. 85-21

In the Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, ET AL., PETITIONERS

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), should compel dismissal of a claim for damages under the Sherman Act (15 U.S.C. 1) in an action brought by shippers alleging that carriers engaged in conduct that clearly violated a rate bureau agreement approved by the Interstate Commerce Commission.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
I. *Keogh* is inconsistent with subsequent decisions of this Court and is no longer necessary to accommodate the Sherman Act and the Interstate Commerce Act	6
A. Post-*Keogh* developments establish that none of the factors relied on in *Keogh* is persuasive today	7
B. Damage suits for price-fixing in violation of an ICC-approved ratemaking agreement would not interfere with the operation of the Interstate Commerce Act or the ICC's regulatory authority	15
II. Private damage actions would further the regulatory objectives of the Interstate Commerce Act as well as recent congressional efforts to promote competition in the transportation industry	21
Conclusion	27

TABLE OF AUTHORITIES

Cases:	Page
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538	13
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571	26
Bell Potato Chip Co. v. *Aberdeen Truck Line*, 43 M.C.C. 337	13, 14
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251	15
Board of Trade v. *ICC*, 646 F.2d 1187	20, 22
California v. *FPC*, 369 U.S. 482	10, 16
Cantor v. *Detroit Edison Co.*, 428 U.S. 579	19
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213	9, 11, 17, 19
Chevron, U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984)	12
Chicago Mercantile Exchange v. *Deaktor*, 414 U.S. 113	13
Christopher v. *Brusselback*, 302 U.S. 500	12
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Cases—Continued: Page

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Far East Conference v. *United States*, 342 U.S. 570 17
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Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 .....8, 9, 23
Glama Dress Co. v. *Mid-South Transports, Inc.*, 335 I.C.C. 586 .....13, 18
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Hawaii v. *Standard Oil Co.*, 405 U.S. 251 .....4, 8
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Household Goods Rates of Jacob's Van Line, 17 M.C.C. 293 18
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Middlewest Motor Freight Bureau v. *United States*, 433 F.2d 212, cert. denied, 402 U.S. 999 14
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985) 25
National Gerimedical Hospital & Gerontology Center v. *Blue Cross*, 452 U.S. 378 16
Niagara Frontier Tariff Bureau, Inc.—Agreement, 297 I.C.C. 494 2

Page

Northern Pacific R.R. v. *United States*, 356 U.S. 1 25
Oilfield Equipment, Materials, Supplies to & Between the Southwest, 313 I.C.C. 577 20
Otter Tail Power Co. v. *United States*, 410 U.S. 366 ..9, 15, 18-19
Pennsylvania R.R. v. *United States*, 363 U.S. 202 13
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Phonetele, Inc. v. *AT & T*, 664 F.2d 716, cert. denied, 459 U.S. 1145 10
Rate Bureau Investigation, 349 I.C.C. 811 21
Reiter v. *Sonotone Corp.*, 442 U.S. 330 25
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 .....8, 13
Rules to Govern the Assembling & Presenting of Cost Evidence, 337 I.C.C. 298 18
Silver v. *New York Stock Exchange*, 373 U.S. 357 .....9, 15
Southern Motor Carriers Rate Conference v. *United States*, No. 82-1922 (Mar. 27, 1985) 17
Southern Pacific v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 14
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 15
Straus v. *Victor Talking Machine Co.*, 297 F. 791 15
Strobl v. *New York Mercantile Exchange*, 768 F.2d 22 10
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 .....13, 14
Trans-Continental Freight Bureau, In re, 77 I.C.C. 252 9
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United States v. *Borden Co.*, 308 U.S. 188 .....10, 16
United States v. *Chicago, M., St. P. & Pac. R.R.*, 294 U.S. 499 18
United States v. *Consolidated Freightways Corp.*, 340 I.C.C. 208 13
United States v. *Joint-Traffic Association*, 171 U.S. 505 8
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United States v. *Topco Associates, Inc.*, 405 U.S. 596 25

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§ 15, 46 U.S.C. App. (Supp. I) 814 11
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15 U.S.C. 15 26
49 U.S.C. (1970 ed.) 304a 14
49 U.S.C. 10101a(1) 25
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49 U.S.C. 10706(a)(3)(A)(iii) 24
49 U.S.C. 10706(b)(3)(D) 24
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Fed. R. Civ. P.:
Rule 23 ..... 12, 13
Rule 23(b)(1)(A) advisory committee note 12

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Vol. 7 13
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The issue in this case is whether this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), should be applied to bar an antitrust damage action based on conduct that, absent the implied immunity created in *Keogh*, would violate the Sherman Act. The United States has primary responsibility for enforcement of the antitrust laws. It therefore has a substantial interest in urging that immunities from the antitrust laws be recognized only where essential to the attainment of other congressional regulatory objectives and only to the extent intended by Congress.

STATEMENT

1. Petitioners are two corporations that purchased trucking services from respondent motor carriers. The carriers are members of respondent Niagara Frontier Tariff Bureau, Inc. (NFTB), a rate bureau that operates pursuant to an Agreement approved by the Interstate Commerce Commission (ICC). Under the Agreement, respondents may set rates collectively and, if they comply with various

notice and hearing and record-keeping requirements set forth in the Agreement and ICC regulations, the Reed-Bulwinkle Act immunizes their conduct from challenge under the antitrust laws. See 49 U.S.C. 10706.[1]

In 1983 petitioners filed separate class action complaints[2] alleging that respondents had violated the Sherman Act, 15 U.S.C. 1 *et seq.*, by conspiring during a fifteen year period to " 'fix, raise and maintain prices and to inhibit or eliminate competition * * * without complying with the terms of the NFTB [A]greement and by otherwise engag[i]ng in conduct that either was not or could not be approved by the ICC.' " Pet. App. 39a (emphasis and citation omitted). Specifically, the complaints alleged that the tariffs filed by respondents through the NFTB were set by a clandestine "Principals Committee" in violation of the Agreement. Petitioners also claimed that respondents resorted to "threats, coercion and retaliation" to prevent

[1] 49 U.S.C. 10706, as amended, codifies Section 5a of the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472. It provides that an ICC-approved agreement among carriers "may be * * * carried out under its terms and under the conditions required by the [ICC], and the Sherman Act * * * do[es] not apply to parties and other persons with respect to making and carrying out the agreement." The Agreement in this case was approved by the ICC in *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I.C.C. 494 (1955).

[2] The complaints, originally filed in the United States District Court for the District of Columbia, were transferred to the Western District of New York, where a complaint filed by the United States containing essentially the same allegations was then pending. The government suit resulted in a consent decree enjoining respondents from discussing rates "except within an authorized ratemaking body of a rate bureau with a rate agreement," and from "harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates." *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66, 167, at 66,533 (W.D.N.Y. 1984).

carriers from exercising their statutory right to file tariffs independently.[3] Pet. 3. Petitioners sought monetary and injunctive relief.

Respondents moved for judgment on the pleadings, arguing that petitioners' damages claims were barred by *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). The district court found *Keogh* controlling and dismissed the complaints in their entirety. Pet. App. 43a-50a.[4]

2. The court of appeals, in an opinion by Judge Friendly, affirmed in part, and reversed in part. Pet. App. 1a-41a.

Point-by-point, the court of appeals explained why the four factors that formed the basis for the holding in *Keogh* "do not seem so compelling today as they did in 1922." Pet. App. 9a. First, in response to the concern expressed in *Keogh* (260 U.S. at 163) that antitrust damages might operate as a rebate, creating forbidden discrimination among shippers, the court of appeals observed that such fear was "scarcely applicable to class actions" that provide more uniform relief. Pet. App. 10a. Second, *Keogh* referred to the difficulty of determining whether the ICC would have approved a "hypothetical lower rate" proposed as the benchmark for assessing antitrust damages. Pet. App. 11a. The court of appeals noted (*ibid.*) that this concern was answered by "many later cases" referring "similar issues to the ICC." *Ibid.* The third factor in the *Keogh* rationale was the burden of proving injury because lower rates might have been passed on to shippers' customers. 260 U.S. at 165. But, as the court of appeals commented (Pet. App. 12a), this Court has itself labeled as dictum *Keogh*'s reference to "passing-on" (*Hanover Shoe, Inc.* v. *United*

[3] Under Section 5a(1)(B)(6) of the Reed-Bulwinkle Act (62 Stat. 473), a rate bureau agreement must afford each carrier "the free and unrestrained right to take independent action either before or after any determination arrived at" collectively.

[4] The district court also concluded that the petitioners' allegation of a "broader conspiracy" to inhibit competition involving conduct not related to rates was insufficient to avoid dismissal under *Keogh*. Pet. App. 48a-50a.

Shoe Machinery Corp., 392 U.S. 481, 491 n.8 (1968)), and recent decisions of this Court appear to reject that rationale altogether. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 723-726 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Hanover Shoe, Inc.*, 392 U.S. at 487-494.

The court of appeals also questioned as "no longer seem[ing] so self-evident" *Keogh*'s central premise—that a rate the ICC has determined to be "legal" cannot be illegal under the antitrust laws. Pet. App. 13a. The existence of a "zone" within which a rate might fall and still pass muster under the Interstate Commerce Act would allow shippers to base an antitrust action on the difference between the rate actually charged and the "lower but still reasonable rate that would have prevailed under free competition." *Ibid.* Moreover, the court noted (*ibid.* (citation omitted)) that post-*Keogh* precedent had firmly established that "implied exemptions to antitrust liability are 'strongly disfavored,' " and that "activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity." Finally, the court concluded (Pet. App. 15a) that "[t]he case for reaching a contrary conclusion today to that reached" in *Keogh* "is particularly strong in light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates."

Although the court of appeals found (Pet. App. 3a) "much of the reasoning of *Keogh* * * * outdated," it held that *Keogh*'s "language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court." Pet. App. 3a. Moreover, the court of appeals noted that *Keogh* could not be distinguished because its holding was not limited to situations where "rates had been investigated and approved by the ICC," but precluded private antitrust actions "whenever tariffs have been filed."

Id. at 6a-7a. Accordingly, the district court's order was affirmed insofar as it dismissed damage claims based on the respondents' rate-fixing activities.[5]

SUMMARY OF ARGUMENT

The complaints in this case alleged that respondents engaged in conduct that is illegal per se under the antitrust laws and outside the scope of their ICC-approved Agreement.[6] The court of appeals, despite its serious doubts about the continued soundness of *Keogh*, concluded that it had no choice but to affirm the district court's dismissal of the rate-related portions of the complaints. The question before this Court is whether, on the facts of this case, *Keogh* continues properly to accommodate the objectives of the antitrust laws and the Interstate Commerce Act. We submit that it does not.

Developments in antitrust and other areas of the law have substantially eroded the foundations of *Keogh*. In the 63 years since *Keogh* was decided, this Court has specifically addressed each of the reasons advanced in that case for barring antitrust damage actions. These post-*Keogh* precedents clearly establish that none of the factors relied on in *Keogh* is either controlling or persuasive today.

Keogh's categorical prohibition of antitrust damage actions is also inconsistent with this Court's repeated holdings that implied antitrust immunity is disfavored and should be granted only if there is a "plain repugnancy" between the antitrust laws and a regulatory statute. There is

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[5] As to petitioners' claims for injunctive relief, however, the court of appeals reversed. It indicated that petitioners should be allowed to amend their complaints "to state claims for damages other than damages arising from the filed tariffs." Pet. App. 36a-40a.

[6] Because the complaints were dismissed on the pleadings, petitioners' allegations must for present purposes be taken as true. See, *e.g.*, *Hughes* v. *Rowe*, 449 U.S. 5, 10 (1980).

no repugnancy here between the Sherman Act and the Interstate Commerce Act. Congress has provided express statutory immunity for collective ratemaking undertaken in conformity with an ICC-approved agreement; ratemaking outside the scope of such an agreement is naked price fixing. Thus, the conduct alleged in the complaints subverts both the objectives of the antitrust laws and the regulatory scheme. Allowing private damage actions in a case such as this would not subject carriers to duplicative or inconsistent standards, frustrate the operation of the Interstate Commerce Act, or interfere with the ICC's exercise of its regulatory authority.

The availability of private damage actions would in fact further the regulatory objectives of both the Sherman Act and the Interstate Commerce Act. Their availability would serve as a powerful incentive for carriers to comply strictly with the requirements imposed by Congress for express statutory immunity. Where carriers fail to comply with those requirements, damage actions would further the fundamental national policies underlying the antitrust laws. The availability of this antitrust remedy is especially important now, for in this and several other once-pervasively regulated areas, Congress has determined that competition rather than regulation will best serve consumer welfare. The continued application of *Keogh*'s categorical ban on private antitrust enforcement would frustrate this legislative policy.

ARGUMENT

I. *KEOGH* IS INCONSISTENT WITH SUBSEQUENT DECISIONS OF THIS COURT AND IS NO LONGER NECESSARY TO ACCOMMODATE THE SHERMAN ACT AND THE INTERSTATE COMMERCE ACT

Keogh is an early example of this Court's pragmatic efforts to harmonize congressional objectives in the Sherman Act with those of a regulatory statute. Thus, *Keogh*

was in fact, if not in name, an "implied antitrust immunity" case. Since 1922, however, this Court has shaped many contours of antitrust and regulatory law that were vague and uncertain when *Keogh* was decided, and class action remedies have been developed. As a result, the difficulties perceived in *Keogh* as warranting implied prohibition of a damage action in a case such as this have been resolved or deemed irrelevant. Over the same period of time, moreover, this Court has concluded that implied antitrust immunity should be conferred only upon the clearest showing of a conflict between the Sherman Act and another federal statute. These parallel developments undercut the rationale relied on in *Keogh*, and render that decision obsolete and its continued application anomalous.

A. Post-*Keogh* Developments Establish That None Of The Factors Relied On In *Keogh* Is Persuasive Today

1. In *Keogh*, a shipper brought an antitrust action alleging that various railroads had violated the Sherman Act by conspiring to fix tariffs that were filed with and ultimately approved by the ICC.[7] This Court held that a shipper could not maintain a private antitrust damage action for rates filed with the ICC. Four reasons were advanced for this conclusion. First, because the Interstate Commerce Act provided shippers with an opportunity to challenge rates as "unreasonably high or discriminatory," Congress could not have "intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust" laws. 260 U.S. at 162. Second, antitrust damage awards would, "like a rebate, operate to give" an individual shipper "a preference over his trade competitors," and thereby contravene the Interstate Commerce Act's objective of "prevent[ing] * * * unjust discrimination" among shippers. *Id.* at 163. Third,

[7] Keogh had challenged the tariffs at issue in several proceedings before the ICC (260 U.S. at 160-161), and the Commission had, "after extensive hearings * * * approved" the rates. *Id.* at 160.

because there was "no conceivable proceeding" whereby the ICC could pass on the validity of a rate posited for the purpose of calculating antitrust damages (*id.* at 164), the shipper would be unable to sustain its burden of proof as to damages. Finally, the shipper's damages were "purely speculative" (*ibid.*), because the benefit of a lower rate "might have gone to [its] customers or conceivably, the ultimate consumer." *Id.* at 165.

2. This Court, though it has had no occasion explicitly to reconsider *Keogh,*[8] has in various cases subsequent to *Keogh* considered every one of the factors relied on in that decision. These precedents, taken together with intervening procedural and administrative developments, undermine the rationale of *Keogh.*

a. *Keogh*'s first premise—that because Congress provided a regulatory remedy it could not have intended also to provide an antitrust remedy—is not tenable today. Whatever the merit of such a view in 1922, when federal regulation was limited and the applicability of the antitrust laws to regulated conduct was unclear,[9] in today's era of

[8] *Keogh* has been cited in passing in various recent decisions of this Court, but in none of these cases was *Keogh* controlling. See *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (noting that "inability to prove * * * legally cognizable damages" may limit relief available in an antitrust action, but does not divest court of jurisdiction; citing *Keogh*); *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 299-300 & n.12 (1973) (noting that conduct is often subject to both antitrust laws and regulatory scheme; citing *Keogh* along with ten other implied immunity cases); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260 (1972) (citing *Keogh* in the course of explaining the holding in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945)).

[9] Although *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290 (1897), and *United States* v. *Joint-Traffic Association,* 171 U.S. 505 (1898) had held that private agreements among railroads to fix rate levels and divide revenues were subject to government enforcement actions, the legality of industry-wide, collective ratemaking was uncertain in 1922. Indeed, at the time *Keogh* was decided the ICC

extensive federal administrative regulation[10] this approach would vitiate the "fundamental national policies" embodied in the antitrust laws. *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973).

Thus, in numerous cases decided since *Keogh,* this Court has consistently rejected the notion that the availability of an administrative remedy, standing alone, evinces a congressional intent to deny relief under the antitrust laws. See, *e.g., Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 224 (1966) (availability of reparations under the Shipping Act does not preclude damage award in antitrust suit); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-375 (1973) (agency's authority to compel interconnection does not preclude court from ordering same relief in an antitrust action); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351-352 (1963) (banking agency's approval of merger does not bar Clayton Act challenge); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) (neither the Securities Ex-

was, at the direction of Congress, investigating the competitive impact of collective ratemaking by one of the largest rate bureaus of the time. The ICC ultimately concluded that the bureau's operation was consistent with the regulatory objectives of the Interstate Commerce Act. See *In re Trans-Continental Freight Bureau,* 77 I.C.C. 252, 279 (1923). With the ICC's approval, motor carriers adopted the collective ratemaking practices of the railroads after the passage of the Motor Carrier Act, 1935, ch. 498, 49 Stat. 543 *et seq.*. See 1936 ICC Ann. Rep. 74.

The legality under the antitrust laws of collective ratemaking thus remained unclear until 1945, when this Court held in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 458 (1945), that collective ratemaking resulting in "discriminat[ion] against a State or a region * * * [or] coercion in the fixing of rates" could be enjoined under the Sherman Act. As will be discussed more fully (pages 21-22, *infra*), Congress responded to *Georgia* by passing the Reed-Bulwinkle Act, which provided express statutory immunity for authorized collective ratemaking activities.

[10] See 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 224f, at 157 (1978).

change Act nor stock exchange rules posed a legal barrier to antitrust action); *California* v. *FPC,* 369 U.S. 482 (1962) (Clayton Act not displaced by the Natural Gas Act); *United States* v. *RCA,* 358 U.S. 334, 344 (1959) (FCC approval of license exchange does not preclude antitrust suit); *United States* v. *Borden Co.,* 308 U.S. 188, 195-199, 205-206 (1939) (neither the Agricultural Adjustment Act nor the Capper-Volstead Act displaced the Sherman Act).[11]

b. Similarly, this Court's more recent decisions, coupled with other changes in the law, have effectively allayed the concern expressed in *Keogh* that antitrust damages are inimical to a regulatory scheme aimed at preventing discrimination among shippers at the hands of carriers. In *Keogh,* an individual shipper-plaintiff was challenging tariffs that had been specifically approved by the ICC

[11] In keeping with this Court's teaching, lower courts have also repeatedly rejected arguments that a regulatory remedy precludes antitrust relief. See, *e.g., Strobl* v. *New York Mercantile Exchange,* 768 F.2d 22, 29-30 (2d Cir. 1985); *MCI Communications Corp.* v. *AT & T,* 708 F.2d 1081, 1102-1103 (7th Cir.), cert. denied, 464 U.S. 891 (1983); *Phonetele, Inc.* v. *AT & T,* 664 F.2d 716, 734-735 (9th Cir. 1981), cert. denied, 459 U.S. 1145 (1983).

These decisions, of course, represent a complete about-face from the presumption relied on in *Keogh*. It is now established that the canon of construction that " '[i]mmunity from the antitrust laws is not lightly implied' * * * reflects the felt indispensable role of antitrust policy in the maintenance of a free economy." *Philadelphia National Bank,* 374 U.S. at 348 (quoting *California* v. *FPC,* 369 U.S. at 485). Thus, absent an explicitly stated legislative intent to the contrary, antitrust and regulatory remedies are not mutually exclusive. Indeed, this Court recently described a regulatory landscape in which both administrative and antitrust damages would be available to motor carriers under the circumstances presented here. *ICC* v. *American Trucking Associations, Inc.,* No. 82-1643 (June 5, 1984), slip op. 6 (upholding ICC's authority to nullify retroactively motor carrier tariffs filed in violation of an ICC-approved Agreement, noting that "[w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under [the Interstate Commerce Act] and whatever additional amounts the antitrust laws allow" (see also slip op. 7 (O'Connor, J., dissenting)).

after "extensive hearings" (260 U.S. at 160) and it was in this context that the Court expressed the view that antitrust damages might amount to a "rebate" or "preference." But in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966), the Court squarely and unanimously rejected the notion that antitrust damages would do violence to a statutory scheme aimed at preventing discrimination among shippers. In *Carnation*, as here, the rates did not have specific agency approval, and had been fixed in a manner that did not qualify for express statutory immunity.[12] In holding that shippers were entitled to seek antitrust damages despite the Shipping Act's ban on discrimination,[13] the Court concluded that "Congress was concerned with assuring equality of treatment by [carriers], not with equality of treatment by juries in collateral proceedings." 383 U.S. at 219 n.3. Thus, *Carnation* expressly rejected the assumption, implicit in *Keogh*, that "Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others" (*ibid.*).[14] *Carnation*'s conclusion that it would be unfair to allow carriers to shield their wrongdoing by invoking a statutory provision designed to protect *shippers* is, moreover, con-

[12] Section 15 of the Shipping Act, 1916, 46 U.S.C. App. (Supp. I) 814, like the Reed-Bulwinkle Act, immunizes collective ratemaking undertaken pursuant to an Agreement approved by the regulatory agency.

[13] See § 17, 46 U.S.C. App. (Supp. I) 816.

[14] Although *Carnation* did not "overrule" *Keogh,* it clearly rejected *Keogh*'s suggestion that antitrust damages were unavailable in all cases where a regulatory scheme prohibited discrimination. *Keogh* was cited throughout the briefs in *Carnation,* and the respondent in *Carnation* explicitly argued that *Keogh* was controlling in this regard. See Resp. Br. at 48, 59-60, *Carnation Co.* v. *Pacific Westbound Conference, supra.*

sistent with the ICC's longstanding view that the Interstate Commerce Act's prohibition of discrimination is intended solely for the benefit of shippers.[15]

Moreover, the availability of class actions under Fed. R. Civ. P. 23 has eliminated the possibility that antitrust damage actions might advantage one shipper over others, as the court of appeals correctly recognized (Pet. App. 10a-11a).[16] Rule 23 was designed to address the problem that troubled this Court in *Keogh*: the possibility that similarly situated plaintiffs would receive varying treatment at the hands of different factfinders. See Fed. R. Civ. P. 23(b)(1)(A) advisory committee note (1966 Amendment) (class action available where "[a]ctions by or against a class provide a ready and fair means of achieving unitary adjudication"); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1773, at 10 (1972) ("[t]his portion of the rule * * * clearly embraces cases in which the party is obliged by law to treat the class members alike"). There is therefore no longer a reasonable basis to fear that piecemeal litigation will result in lack of uniformity and, ultimately, in discrimination among shippers.

c. Time has also rendered obsolete *Keogh*'s concern that, because there was "no conceivable proceeding" in which the ICC could pass on the validity of a hypothetical rate, a shipper-plaintiff would be unable to prove that a

[15] See *Petition for Declaratory Order—Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711, 715 n.6 (1982) (citing cases). Indeed, the ICC has expressed doubt whether carriers even have standing to challenge a tariff on the ground that it might, as a theoretical matter, result in discrimination. *Ibid.* The ICC's interpretation of the "statutory scheme it is entrusted to administer," is of course entitled to "considerable weight." *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6 (footnote omitted); see also *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).

[16] Although class actions or "representative suits" were not unknown prior to the adoption of Rule 23 in 1938, see, *e.g.*, *Christopher* v. *Brusselback*, 302 U.S. 500 (1938), they were not common, and they were generally limited to equitable rather than legal causes of action. See Z. Chafee, *Some Problems of Equity* 199 (1950); 7 C. Wright & A. Miller, *supra*, § 1751, at 506. But the possibility that a class action of sorts might have been maintained in 1922 did not render *Keogh*'s fear of inconsistent verdicts groundless; the res judicata effect of class action judgments was unclear for quite some time even under Rule 23. 7 C. Wright & A. Miller, *supra*, § 1751, at 509-510. Indeed, prior to the extensive amendments to Rule 23 in 1966, a class action suit " 'was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation which might or might not be accepted.' " *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 546 (1974) (citation omitted). The 1966 amendments were designed, in part, "to assure that members of the class would be * * * bound by all * * * orders and judgments." 414 U.S. at 547 (footnote omitted).

lower rate posited for the purpose of calculating antitrust damages would have been lawful under the Interstate Commerce Act (260 U.S. at 164). As the court of appeals observed, since *Keogh* was decided this Court itself has in "many * * * cases * * * directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" (Pet. App. 11a).[17] It is now well settled that the ICC can pass on the reasonableness of tariffs in response to a reference from a pending judicial proceeding. See, *e.g.*, *United States* v. *Consolidated Freightways Corp.*, 340 I.C.C. 208 (1971); *Glama Dress Co.* v. *Mid-South Transports, Inc.*, 335 I.C.C. 586 (1969). See generally *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, 340-342 (1944).[18]

[17] See, *e.g.*, *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 203-206 (1960); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 62-70 (1956); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940). See also *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (antitrust action stayed pending administrative determination of validity of defendant's conduct under regulatory statute).

[18] Although this Court held in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), that reparations were unavailable to shippers under either the Motor Carrier Act or at common law, *T.I.M.E.* did not in-

d. Finally, *Keogh*'s supposition that a shipper's damages were "purely speculative" (260 U.S. at 164), because a lower rate might have been "passed on" to its customers has subsequently been rejected by this Court. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968), the Court characterized that statement in *Keogh* as "dictum." And this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 723-726 (1977), established that *only* those parties who, like petitioners, purchase services directly from a defendant can recover antitrust damages.[19] Moreover, in numerous cases decided after *Keogh*, this Court has emphasized that an antitrust plaintiff is not required to demonstrate the amount of its

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validate the reference procedure outlined in *Bell Potato Chip* and earlier ICC cases. See *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. at 89 (citing *Bell Potato Chip* with approval in case where reasonableness of routing practice was referred to ICC for determination pursuant to district court action).

In response to *T.I.M.E.*, Congress amended the Motor Carrier Act in 1965 to authorize reparations for shippers. See 49 U.S.C. (1970 ed.) 304a; *Middlewest Motor Freight Bureau* v. *United States,* 433 F.2d 212, 232-233 (8th Cir. 1970), cert. denied, 402 U.S. 999 (1971). The ICC, however, still has no authority under the Motor Carrier Act to award reparations; such suits must be brought in a district court, and the issue of reasonableness is then referred to the ICC to be resolved in an administrative proceeding, in accordance with the doctrine announced in *Bell Potato Chip.*

[19] *Keogh*'s reliance on a "pass-on" rationale to deny damages ignored the fact that "[e]ven if a buyer prices for resale simply by marking up the purchase price, the higher price at which it must resell may reduce its volume of sales, and hence its profit." L. Sullivan, *Handbook of the Law of Antitrust* § 252, at 789 (1977). Indeed, four years before *Keogh* was decided the Court had explicitly rejected the contention that railroad shippers were not entitled to reparations because they were able to "pass-on" unreasonable rates to their customers. *Southern Pacific* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). *Keogh* distinguished *Southern Pacific* on the ground that the ICC had declared in that case what rate would have been "reasonable." 260 U.S. at 165.

damages with "mathematic precision."[20] As the Court noted in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 565-566 (1931), quoting *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 802 (2d Cir. 1924), " '[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.' "

B. Damage Suits For Price-Fixing In Violation Of An ICC-Approved Ratemaking Agreement Would Not Interfere With The Operation Of The Interstate Commerce Act Or The ICC's Regulatory Authority

Because *Keogh*'s stated rationale no longer justifies its bar against antitrust damage actions by shippers, *Keogh* can retain vitality only if its holding conforms to this Court's prevailing standards governing the recognition of implied antitrust immunity. The application of those standards to the statutory scheme at issue here compels the conclusion that respondents are not entitled to implied immunity from Sherman Act damage actions.

1. Because the antitrust laws embody "fundamental national policies" favoring competition (*Otter Tail Power Co.* v. *United States,* 410 U.S. at 374), implied immunity is appropriate only where there is a "plain repugnancy between the antitrust and regulatory provisions" (*United States* v. *Philadelphia National Bank*, 374 U.S. at 350-351 (footnote omitted)) and even then "only to the minimum extent necessary [to] make the [statutory scheme] work" (*Silver* v. *New York Stock Exchange*, 373 U.S. at 357). In short, as this Court noted in *Goldfarb* v. *Virginia State*

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[20] See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 & n.7 (1962); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-265 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 378-379 (1927).

Bar, 421 U.S. 773, 787 (1975), "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." See also *Union Labor Life Insurance Co.* v. *Pireno,* 458 U.S. 119, 126 (1982); *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross,* 452 U.S. 378, 388-389 (1981); *FMC* v. *Seatrain Line, Inc.,* 411 U.S. 726, 733 (1973).

This presumption against implied antitrust immunity "reflects the felt indispensable role of antitrust policy in the maintenance of a free economy" (*Philadelphia National Bank,* 374 U.S. at 348), and is particularly compelling where, as here, Congress has crafted a regulatory scheme that provides for express antitrust immunity. In such circumstances the scope of immunity should not extend beyond the limits laid down by statute, because "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States* v. *Borden Co.,* 308 U.S. at 201. See also *California* v. *FPC,* 369 U.S. at 485. It strains credulity to suggest that, in granting express immunity in the Reed-Bulwinkle Act for collective ratemaking undertaken in conformity with an ICC-approved agreement, Congress also intended to immunize at the same time conduct *not* in conformity with such an agreement, which subverts *both* the Reed-Bulwinkle Act and the Sherman Act. While we agree with the court of appeals that Congress did not overrule *Keogh* in passing the Reed-Bulwinkle Act (see Pet. App. 25a), there is conversely no indication that it intended to fix by legislative fiat the balance this Court struck in 1922 between the Interstate Commerce Act and the antitrust laws.[21] Thus, as in any case where Congress has provided for express statutory immunity, conduct outside the scope of congressional authorization is presumptively not entitled to antitrust immunity.

[21] In passing the Reed-Bulwinkle Act, Congress delineated with precision the forms of collective ratemaking that are immune from antitrust challenge. For that reason, the various references in that Act's legislative history to then-prevailing antitrust law amount to no more than a confirmation that conduct outside the scope of express immunity would be subject to antitrust scrutiny. The issue here is whether *Keogh*'s judicially-crafted immunity remains necessary to accommodate the Sherman Act and the Interstate Commerce Act, and there is therefore no reason to assume that Reed-Bulwinkle "cast in bronze" the rule announced in *Keogh. City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). Such an assumption would be particularly inappropriate given the long tradition of dialogue between the judicial and legislative branches that has served to perfect and preserve the vitality of the antitrust laws. See, *e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 229-235 (1948). Compare *Carnation,* 383 U.S. at 220-222, with *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932), and *Far East Conference* v. *United States,* 342 U.S. 570 (1952).

2. This case satisfies none of the criteria that this Court has recognized as warranting implied immunity. There is no "clear repugnancy" between damage actions and the Interstate Commerce Act, and no possibility that antitrust damage actions would interfere with the operation of the regulatory scheme, or subject respondents to "duplicative and inconsistent standards." See *United States* v. *National Association of Securities Dealers, Inc.* 422 U.S. 694, 735 (1975).

a. An antitrust damage award premised on a rate lower than that filed by a carrier would not necessarily pose even a theoretical inconsistency with the ICC's regulatory authority. As the court of appeals correctly noted (Pet. App. 14a n.3),[22] the fact that a particular tariff filed in violation of an ICC-approved agreement may be

[22] Unlike the situation in *Southern Motor Carriers Rate Conference* v. *United States,* No. 82-1922 (Mar. 27, 1985), where the challenged conduct was contemplated under a state regulatory scheme, here it is alleged that respondents violated the ICC-approved ratemaking Agreement. Of course, the present case does not implicate the considerations of comity that informed the Court's decision in *Southern Motor Carriers.*

"reasonable" does not establish that a lower tariff is unreasonable. There is a "zone of reasonableness * * * between maxima and minima within which a carrier is ordinarily free to adjust its charges." *United States* v. *Chicago, M., St. P. & Pac. R.R.*, 294 U.S. 499, 506 (1935). Because there is a range within which rates may fall and still satisfy the controlling statutory criteria,[23] the calculation of antitrust damages based on rates different from those filed with the ICC but still within this range would not violate the rate structure or infringe upon the ICC's authority.

Moreover, the ICC has long taken the position (*Rules to Govern the Assembling & Presenting of Cost Evidence*, 337 I.C.C. 298, 378 (1970)) that its

> statutory scheme of ratemaking still generally leaves the initiative to the carriers. Indeed, it is their responsibility, in the first instance, to set appropriate rates and they are free to initiate such changes as they deem proper in their managerial discretion. The Commission is not, and was never meant to be, the manager of the operations of regulated carriers.

Because "the initial decision to publish a rate is, ordinarily, made by a carrier pursuant to its managerial discretion" (*id.* at 306), application of the antitrust laws would in no way usurp the regulatory prerogatives of the ICC. See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. at

[23] A tariff is not unreasonable simply because it is higher or lower than a tariff filed by another carrier or carriers involving the same transportation. See, *e.g.*, *Household Goods Rates of Jacob's Van Line*, 17 M.C.C. 293 (1939); *Household Goods Rates of A.D. Rymers & Sons*, 12 M.C.C. 541 (1936). Differences among tariffs are also insufficient, standing alone, to support an inference that there has been an impermissible "preference or prejudice." See, *e.g.*, *Clama Dress Co.*, 335 I.C.C. at 596 ("Commission has frequently held that preference and prejudice are not prohibited unless they are undue or unreasonable. To be undue they must be shown to be a source of advantage to the parties or traffic alleged to be favored.").

374 (where challenged conduct results from the exercise of "business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override" the antitrust laws); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 737 (1973).

b. It is extremely unlikely that damage actions would result in any actual interference with the ICC's exercise of its regulatory authority. Obviously, an "award of treble damages for past and completed conduct which clearly violated" an ICC-approved agreement would "certainly not interfere with any future action of the Commission." *Carnation*, 383 U.S. at 222. And it is plain that there is little or no danger that antitrust suits would conflict with any prior ICC determinations, because, as this Court noted in *ICC* v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), slip op. 6 n.4, the ICC is currently capable of reviewing only an insignificant fraction of the total tariffs filed.[24] There may, of course, be cases where the ICC has reached a specific determination that would foreclose certain issues in an antitrust action.[25] When that

[24] In 1983 the ICC examined 188 tariffs out of 1.2 million filed, and suspended 11 (Pet. App. 14a n.3; see 1983 ICC Ann. Rep., Tables 6, 9, at 113-114 (1984)). By contrast, at the time *Keogh* was decided the total number of tariffs filed annually was approximately 8% of what it is today. See 1923 ICC Ann. Rep. 37 (94,780 tariffs filed). In view of the 1200% increase in tariff filings between 1923 and 1983, in today's regulatory environment the ICC's decision not to investigate a particular tariff surely cannot be regarded as tantamount to regulatory approval. See, *e.g.*, *MCI Communications Corp.* v. *AT & T*, 708 F.2d at 1104-1105 (where agency is able to investigate only a "small percentage" of 1,371 tariffs filed annually, tariff that agency has neither "dictated nor approved" is not immune from antitrust challenge). See also *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 593-594 (1976).

[25] Thus, a finding that the challenged conduct was within the terms of the approved Agreement would trigger express immunity under the Reed-Bulwinkle Act. Were respondents to contest whether their conduct in fact violated the ICC-approved Agreement, that issue might be

occurs, steps may be taken or rulings made, that are suitable to the circumstances.[26] But the fact that the relief sought in an antitrust damage action might in a particular case conflict with a specific ICC determination does not warrant the conclusion that, as a matter of law, no such antitrust damage actions should be permitted.

c. Because damage actions would not, as a theoretical or practical matter, interfere with the ICC's administration of the Interstate Commerce Act, the imposition of antitrust damage liability would not subject carriers to "duplicative and inconsistent" standards. As noted above, the primary initiative for setting rates rests with the carriers—not with the ICC. And as long as carriers comply with an ICC-approved agreement, they may collectively exercise the wide ratemaking discretion they have under the Interstate Commerce Act. But collective ratemaking

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referred to the ICC for determination in the first instance. See *Board of Trade* v. *ICC*, 646 F.2d 1187, 1193 (7th Cir. 1981). Similarly, if the ICC had in an administrative proceeding defined the lower bounds of reasonableness for a particular tariff (see, *e.g.*, *Iron & Steel Articles—Eastern Common Carriers*, 305 I.C.C. 369, 398 (1959) (prescribing a minimum tariff in order "to elevate such rates as are clearly below a compensatory level * * * thus ending destructive competition"), that finding would govern in an antitrust suit.

[26] The claim most likely to arise in an antitrust action that would require administrative resolution by the ICC is that the rate used for calculating antitrust damages would have been disallowed as "unreasonably" low. In cases where this argument seems plausible (cf. *Oilfield Equipment, Materials, & Supplies to & Between the Southwest*, 313 I.C.C. 577, 602 (1961) ("Our policy, stated in too many decisions to require citation here, is that our power to prescribe minimum rates should be sparingly exercised.")), bifurcation of the antitrust action into separate liability and damage proceedings will provide the ICC with an opportunity to exercise appropriate discretion. In many cases, of course, it may be entirely unnecessary to refer any damage-related issues to the ICC. Certainly no reference would be necessary if a plaintiff failed to establish liability, and in many cases the parties might find it advantageous to stipulate the appropriate range of reasonable rates in light of prior ICC determinations.

outside the scope of Reed-Bulwinkle immunity is naked price-fixing, condemned by both the Reed-Bulwinkle Act and the Sherman Act.[27] In this case, petitioners allege that the respondents have engaged in conduct that was not approved, and could not be approved, by the ICC. Accordingly, there is no merit to the argument that the imposition of antitrust liability would place carriers in a position where they cannot comply with the dictates of one statute without violating another.

II. PRIVATE DAMAGE ACTIONS WOULD FURTHER THE REGULATORY OBJECTIVES OF THE INTERSTATE COMMERCE ACT AS WELL AS RECENT CONGRESSIONAL EFFORTS TO PROMOTE COMPETITION IN THE TRANSPORTATION INDUSTRY

1. As the facts of this case demonstrate, carriers armed with *Keogh* immunity have a strong incentive to form cartels to engage in conduct that far exceeds the intent of Congress in conferring limited express immunity in the Reed-Bulwinkle Act. Because, as the court of appeals noted, *Keogh* shields even the most egregious violations of an ICC-approved Agreement from damage liability, it rewards carriers for violating both the Reed-Bulwinkle Act and the antitrust laws. Hence, the overruling of *Keogh* would foster compliance with both the antitrust laws and the Reed-Bulwinkle Act.

Congress was well aware of the potential evils of collective ratemaking. The legislative history of the Reed-Bulwinkle Act shows that Congress did not intend that carriers would be allowed to "go ahead and do as they please" under the Act (94 Cong. Rec. app. at A3926 (1948)). Instead, the Act sought to protect the public interest by opening the ratemaking process to participation

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[27] The ICC itself has taken the position that "relief from the antitrust laws * * * obtains only where the approved agreement is carried out strictly in conformity with its provisions and within the terms and conditions prescribed by this Commission." *Rate Bureau Investigation*, 349 I.C.C. 811, 824 (1975).

by shippers and the public.[28] At the same time, the Act guaranteed each carrier the right to take "independent action either before or after any determination arrived at" collectively (§ 5a(1)(B)(6), 62 Stat. 473; see also 49 U.S.C. 10706(d)(2)(C)). In providing open ratemaking procedures and protecting the individual carrier's right to take independent action, of course, Congress sought to protect the public interest. These two features were the quid pro quo for the antitrust immunity Congress conferred upon carriers.

The respondents in this case allegedly violated these two fundamental requirements of the Act by setting rates in a secret "Principals Committee" and by resorting to "threats, coercion and retaliation" to prevent carriers from exercising their statutory right to act independently. Obviously, if these allegations are true, respondents have also engaged in conduct that is illegal per se under the Sherman Act.[29] Allowing shippers to maintain antitrust damage actions in such circumstances would provide an effective incentive for carriers to comply with their ICC-approved agreements and thus would materially further the purposes of the Interstate Commerce Act. See *ICC* v. *American Trucking Associations, Inc.*, slip op. 13 (ICC overcharge remedy encourages "carriers to limit their collective activities to the areas that Congress described in the

[28] As Representative Bulwinkle explained, the "bill provides for complete publicity at every conference to protect the rights of the public" (93 Cong. Rec. app. at A3969 (1947)). In keeping with congressional intent, ICC approval of collective ratemaking agreements has always been conditioned upon various procedural requirements designed to safeguard shipper interests. See, *e.g.*, *Board of Trade* v. *ICC*, 646 F.2d 1187, 1192 (7th Cir. 1981).

[29] See R. Bork, *The Antitrust Paradox* 263 (1978) ("The subject of cartels lies at the center of antitrust policy. The law's oldest and, properly qualified, most valuable rule states that it is illegal per se for competitors to agree to limit rivalry among themselves.").

statutory guidelines"); *Georgia* v. *Pennsylvania R.R.*, 234 U.S. 439, 460-461 (1945) ("If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress.").

2. Private damage actions would also further recent congressional efforts to promote competition in the essential domestic transportation industry. The size and importance of the industry are obvious: expenditures on domestic freight and passenger transportation consistently "account for approximately 20 percent of the Gross National Product" (D. Wyckoff & D. Maister, *The Motor Carrier Industry*, Table I-1, at xxv (1977)),[30] and the pricing of transportation services affects the price of virtually all other goods and services. Recent legislation affecting rail and motor carriers expresses a congressional determination that consumer welfare would be better served if carriers were subject, to a much greater extent than in the past, to the free play of competitive forces. In the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, Congress substantially reduced regulation of motor carriers, based on its conclusion that "protective regulation" had resulted in both "operating inefficiencies" and "anticompetitive pricing" (§ 3(a), 94 Stat. 793, 49 U.S.C.

[30] As of 1980, almost half of the motor carrier industry was subject to ICC regulation (see H.R. Rep. 96-1069, 96th Cong., 2d Sess. 2 (1980)), and that percentage is likely to increase as a result of the relaxed entry standards under the Motor Carrier Act of 1980. In 1982, total revenues in the domestic motor carrier industry (*i.e.*, ICC-regulated carriers and others) amounted to $178 billion, and motor carrier services accounted for 24% of total domestic transport ton-miles. Total revenues in the rail sector in 1982 amounted to $27.1 billion, and rail carrier services accounted for 36% of total domestic transport ton-miles. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States—1985*, at 587 (Table No. 1016); *id.* at 589 (Table No. 1022). Taken together, motor carrier and rail expenditures comprise approximately 90% of total domestic freight transportation expenditures. *Id.* at 587 (Table No. 1016); Motor Carrier Ratemaking Study Commission, *Collective Ratemaking in the Trucking Industry* 72 (1983).

10101 note (Congressional Findings and Declaration of Policy)).[31] Similarly, in both the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, Congress circumscribed the ICC's authority over rail rates. Most importantly, in both recent motor carrier and rail acts, Congress narrowed the scope of Reed-Bulwinkle immunity for collective ratemaking. For example, Congress has stripped carriers of immunity for joint setting of single-line rates, which are by far the most competitively significant rates.[32] Thus, Congress's intent with respect to both motor and

[31] Although the conduct forming the basis for the complaints here occurred largely if not entirely before the effective date of the 1980 Motor Carrier Act, the rule announced by the court of appeals appears broad enough to permit carriers to argue that post-1980 conduct is immunized as well. Moreover, petitioners' discovery prior to dismissal was limited primarily to jurisdictional matters; further discovery may reveal post-1980 conduct by respondents that violated both the ICC-approved Agreement and the antitrust laws. In any event, in the Motor Carrier Act of 1980 Congress determined that the regulatory scheme applicable prior to 1980 was deficient precisely because it resulted in anticompetitive pricing. This finding, and the legislative attention it prompted, undermine any argument that allowing an antitrust damage action for pre-1980 conduct outside the scope of express immunity under the Reed-Bulwinkle Act would frustrate congressional intent. Additionally, as demonstrated above, the decisional premises on which *Keogh* was based had been markedly superseded well before the 1980 legislation, and the practical limits of the ICC's regulatory oversight had been strained by the burgeoning number of tariff filings. Compare 1980 ICC Ann. Rep., Table 7, at 113 (1981) (605,538 tariffs filed in 1980), with 1923 ICC Ann. Rep. 37 (94,780 tariffs filed in 1923).

[32] See 49 U.S.C. 10706(a)(3)(A)(iii) (rate bureau may not "permit a rail carrier to discuss, to participate in agreements related to, or to vote on single line rates proposed by another rail carrier"); 49 U.S.C. 10706(b)(3)(D) (members of motor carrier rate bureau may not "discuss[ ] or vote upon single-line rates * * * July 1, 1984").

rail carriers—and especially their ratemaking—could not be clearer: competition rather than regulation is the order of the day.[33]

It would be consistent with that premise for this Court to remove the remaining judicially-crafted impediment to competition—*Keogh*'s prohibition of antitrust damage actions. The antitrust laws serve to protect competition in the American economy, and vigorous enforcement of those laws is essential. See, *e.g.*, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 8 (1958). Moreover, while the United States has primary responsibility for antitrust enforcement, its resources for the detection of illegal conspiracies are limited. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979). As the Court stated only last Term, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985), slip op. 20. Petitioners, of course, are particularly well-placed to enforce the antitrust laws effectively, for they are intimately familiar with the industry. At present, *Keogh* bars this important and beneficial private enforcement of the Sherman Act against a secret carrier cartel.

[33] See, *e.g.*, 49 U.S.C. 10101a(1) (in public interest "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail"); § 3(a), 94 Stat. 793, 49 U.S.C. 10101 note (Congressional Findings and Declaration of Policy) ("The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the * * * national economy."). See also Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* (amending Federal Aviation Act of 1958 to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"). Preamble, 92 Stat. 1705.

If, as the court of appeals observed (Pet. App. 6a-7a), *Keogh* prohibits antitrust damage actions whenever the cartel members have filed tariffs, there will in essence be no private enforcement of the antitrust laws at all in this crucial sector of the economy.[34] Although Congress has greatly limited the ICC's authority over rates and decreed that competition rather than regulation should largely determine rates, it has not eliminated tariff filing requirements.[35] Accordingly, unless *Keogh*'s ban on private damage actions is lifted, congressional efforts to encourage competition will be anomalously thwarted: the public will lose the important protections formerly afforded by the Reed-Bulwinkle Act and at the same time it will be unable to rely on the potent incentive of private antitrust damage actions to ensure the competitive ratemaking that Congress expected.[36] Since Congress surely did

[34] Shippers presumably have little interest in bringing an injunctive action for past violations of an ICC-approved agreement that would result in, at most, a judicial declaration that carriers should comply with what remains of Reed-Bulwinkle's express immunity provisions.

[35] Allowing shippers to maintain antitrust damage actions would not be at odds with the "filed rate" principle that a "federally regulated [entity may not] charg[e] rates higher than those filed with the" relevant regulatory agency. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 573 (1981). Petitioners' claim is that they have been injured in their business or property as a result of a conspiracy among carriers that violated both the Reed-Bulwinkle Act and the Sherman Act. See 15 U.S.C. 15. The fact that rates other than those filed with the ICC pursuant to the conspiracy may be used to calculate the measure of antitrust injury does not transform an antitrust action into a collateral proceeding aimed at securing "a retroactive rate" decrease (453 U.S. at 578). Moreover, this Court has explicitly reserved the question whether the filed rate doctrine shields "affirmative misconduct" or "fraudulent conduct" such as that alleged here (*id.* at 583 & n.13).

[36] Cf. *Litton Systems, Inc.* v. *AT & T*, 700 F.2d 785, 806-807 & n.30 (2d Cir. 1983), cert. denied, No. 82-2128 (Jan. 16, 1984) (noting various federal tariff filing requirements; rejecting contention that mere filing of tariff provides antitrust immunity because "[i]f this argument were accepted, a common regulatory practice designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate").

not intend " 'to paralyze with one hand what it sought to promote with the other' " (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 631 (1973), quoting *Clark* v. *Uebersee-Finanz-Korp.*, 332 U.S. 480, 489 (1947)), it is time for this Court to overrule *Keogh*.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with directions that petitioners' complaints be reinstated in their entirety.

Respectfully submitted.

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SQUARE D COMPANY, *et al.*,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF WESTERN FUELS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF WESTERN FUELS ASSOCIATION, INC., FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

Western Fuels Association, Inc., moves the Court for leave to file an amicus brief in support of petitioners. The proposed brief is included in this document. Counsel for petitioners and respondents have refused to consent to the filing of the brief.

As is more fully explained in the proposed brief, Western Fuels is a fuel supply cooperative which purchases and mines coal for use in electric generating

plants owned and operated by Western Fuels' owner-members. Western Fuels' owners and members are 36 publicly and cooperatively-owned electric utilities.

Pursuant to arrangements with its members, Western Fuels typically is responsible for arranging the transportation of fuel to its members' plants. Western Fuels thus has negotiated and entered into many contract or tariff relationships with four different railroads in the middle and western part of the United States, as well as constructed short haul private railroads owned and operated through Western Fuels subsidiaries. Given its transportation responsibilities, Western Fuels has considerable experience in the coal transportation business.

Western Fuels believes that the Court's review of *Keogh* v. *Chicago & NW Ry.*, 260 U.S. 156 (1922) should include analysis of the importance of that decision to the rail movement of bulk commodities such as coal. Wholly apart from *Keogh's* significance regarding respondent rate bureau's compliance or non-compliance with the ICC approved agreement, the case has a major impact on railroad practices in setting rates and operating terms. Western Fuels explains in its proposed brief why *Keogh* has no proper present application to this part of the transportation business. While petitioner and the Solicitor General alluded to the recent changes in the regulation of railroads in their requests for certiorari, those parties do not have the same interest as Western Fuels in arguing this aspect of the *Keogh* case.

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF WESTERN FUELS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Congress Has Deregulated Railroad Rates, Thus Undermining *Keogh*'s Rationale	4
II. Rail Rates Are No Longer Approved By The ICC.	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Burlington Northern R. Co. v. *I.C.C.*, 679 F.2d 934 (D.C. Cir. 1982), *cert. denied*, —— U.S. ——, 104 S. Ct. 2150 (1984) 11

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 9

Consumers Power Co. v. *Norfolk & Western Railroad Co.*, ICC Docket No. 378545, slip op. (Jan. 4, 1984). 10

ETSI Pipeline Project, A Joint Venture and Energy Transportation Systems, Inc. v. *Burlington Northern, Inc., et al.*, No. B-84-979-CA (E.D. Tex. filed Oct. 9, 1984) 4

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 9

Houston Lighting & Power Co. v. *United States*, 606 F.2d 1131 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) 11

In re Lower Lake Erie Iron Ore Antitrust Litigation, MDL 587, Slip op. (E.D. Pa. June 5, 1985) 3, 4

Keogh v. *Chicago & NW Ry.*, 260 U.S. 156 (1922) .. 2, 9, 10, 11, 13

Potomac Electric Power Co. v. *I.C.C.*. 744 F.2d 185 (D.C. Cir. 1984) 11

Transkentucky Transportation Railroad v. *L&N R. Co.*, 581 F. Supp. 759 (E.D. Ky. 1983) 3

Western Coal Traffic League v. *United States*, 719 F.2d 772 (5th Cir.), *cert. denied*, 462 U.S. 1110 (1983) .5, 6, 11

Western Fuels v. *Burlington Northern Railroad Co.*, No. C-82-0443 (D. Wyo. Nov. 2, 1984) (Order Approving Settlement) 4

STATUTES:

49 U.S.C. § 10101(a)(1) (1985) 7

49 U.S.C. § 10707 (1985) 10

TABLE OF AUTHORITIES continued

Page

49 U.S.C. § 10709 (1985) 6, 11

49 U.S.C. § 10713(b) (1985) 10

49 U.S.C. § 10713(d) (1985) 6, 10

49 U.S.C. § 10741(f) (1985) 6

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ..... 2, 6, 7, 12

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ..... 2, 5, 7, 8

OTHER AUTHORITIES:

Regulatory Reform Legislation for the Rail Industry: Hearings on H.R. 4650 Before the Subcommittee on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 4 (1980) 8

To Reform the Economic Regulation of Railroads: Hearings on S. 796 Before the Subcommittee of Surface Transportation of the Senate Committee on Commerce, Science and Transportation, 96th Cong., 1st Sess. 251 (1979) 8

H.R. Rep. No. 1430, 96th Cong., 2d Sess. 101, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4133 ..... 6, 7

S. Rep. No. 595, 94th Cong., 2d Sess. 134, *reprinted in* 1976 U.S. Code Cong. & Ad. News 148 ..... 7, 8

S. Rep. No. 499, 94th Cong., 1st Sess. 14 (1975) 7

126 Cong. Rec. 17792 (1980) 8

49 C.F.R. §§ 1039.3, 1300.13 (1983) 10

Coal Rate Guidelines, Nationwide, Ex Parte 347 (Sub-No. 1) slip op. (August 8, 1985), *appeal docketed sub nom. Consolidated Rail Corp.* v. *United States*, No. 81-3080 (3rd Cir.) 12

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BRIEF OF WESTERN FUELS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF WESTERN FUELS

Western Fuels Association, Inc., is a not-for-profit fuel supply cooperative whose members are publicly and cooperatively owned utilities located in twenty-six states and Puerto Rico. Western Fuels purchases and mines coal and arranges for delivery of the coal to its members' electric generating plants. Western Fuels does a significant volume of business with the nation's coal-hauling railroads.

Having negotiated and entered into many long-term coal transportation arrangements with railroads unconstrained by competition or meaningful regulatory control, Western Fuels is profoundly concerned that, under *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), railroads and other carriers lack the Sherman Act's most persuasive incentive to compete solely on the merits—private treble-damage actions. Western Fuels' members and consumers would be better served, in this time of diminishing administrative control, by full application of the antitrust laws to carriers' business practices. Western Fuels thus asks the Court to overturn or to construe narrowly its sixty-year old *Keogh* decision.

SUMMARY OF ARGUMENT

The *Keogh* doctrine, having originated in a railroad case, has been read to include the railroad and the trucking industries. Western Fuels argues that *Keogh* has limited, if any, current applicability to the railroad business.

Railroads should not continue to have almost complete rate freedom, as they do under the 4R[1] and Staggers Acts,[2] and also broad though implied antitrust immunity, nor should shippers be deprived of both administrative and antitrust remedies. Antitrust exposure is fully consistent with Congress' lessening of regulation over the past nine years. The Court's analysis in *Keogh* simply is not appropriate in the context of today's shipper-railroad disputes.

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[1] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (hereinafter "4R Act").

[2] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (hereinafter "Staggers Act").

ARGUMENT

Western Fuels is one of the nation's major shippers of coal. In calendar year 1984 it shipped some 10,462,000 tons of coal to ten destinations in seven states, not including spot sales. Electricity generated in plants burning coal provided by Western Fuels serves consumers in twelve states.

When Western Fuels was incorporated, in 1974, in order to aid its members' acquisition of low-sulfur western coal, its representatives immediately began the arduous task of negotiating coal transportation arrangements with the coal-hauling railroads. Western Fuels continues to negotiate with these railroads, for extensions of service and for movements to new destinations. These negotiations are inevitably exceedingly difficult to bring to fruition. Since the mid-1970's, the railroads have had little incentive to agree on rates and other important terms, particularly for movements from captive or single-service origins or for movements to captive destinations. The Interstate Commerce Commission ("Commission" or "ICC"), at the direction of Congress, has allowed the railroads to price their services with little if any regulatory or cost-based restraint.

At the same time that the railroads have been increasingly unfettered, transportation alternatives, such as short-haul railroads, and slurry pipelines, have been legislatively and otherwise restricted, in large part through the efforts of the railroads.[3] Western Fuels

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[3] *See, e.g., Transkentucky Transportation Railroad* v. *L&N R. Co.*, 581 F. Supp. 759 (E.D. Ky. 1983) (antitrust suit over railroads "illegal acts and obstructive tactics" to foil competition from short-rail and barge project); *In re Lower Lake Erie Iron Ore*

ern Fuels and some of its members considered using coal slurry systems to deliver coal to the members' plants. Western Fuels, like other coal shippers, has been forced to accept less than satisfactory terms in some of its railroad relationships simply because it had no alternative to rail shipment. Western Fuels was eventually forced to file a major antitrust suit against one of the nation's largest coal-hauling railroads as its avenue of relief, since regulation by the ICC was not a realistic alternative.[4]

I. Congress Has Deregulated Railroad Rates, Thus Undermining *Keogh*'s Rationale

The Court's decision in *Keogh* was premised on two principal considerations. First, the Court was concerned about judicial interference with the Commission's finding that the rates challenged in the antitrust suit were "reasonable," since rates found to be reasonable by the ICC cannot be a basis for damages. Second, the Court was concerned about the possibility that the "hypothetical" rates used to measure plaintiff's antitrust damages might themselves be unlawful if they were discriminatory. The Court stated that "unless

Antitrust Litigation, MDL 587, slip op. (E.D. Pa. June 5, 1985) (App. B. to Respondent's Joint Brief in Opposition, Aug. 2, 1985) (antitrust suits over railroads' conspiracy to "destroy competition and monopolize dock-handling, storage and land transportation of iron ore and other commodities"); *ETSI Pipeline Project, A Joint Venture and Energy Transportation Systems, Inc.* v. *Burlington Northern, Inc., et al.*, No. B-84-979-CA (E.O. Tex. filed Oct. 9, 1984) (antitrust suit for conspiracy and other acts to prevent competition from coal slurry pipeline).

[4] *Western Fuels* v. *Burlington Northern Railroad Co.*, No. C-82-0443 (D. Wyo. Nov. 2, 1984) (Order Approving Settlement).

the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give rise to a cause of action." 260 U.S. at 164.

At least three recent legislative changes do much to undermine the *Keogh* rationale as applied to railroad rates. Congress recently eliminated Commission jurisdiction where there is no market dominance, Congress set cost-based jurisdictional thresholds for reasonableness review, and Congress specifically found that the Interstate Commerce Act's anti-discrimination provision should not apply to railroad rate contracts.

The 1976 4R Act reduced the Commission's authority over railroad rates and substituted competition for regulation. The act stripped the Commission of its authority to declare rates "unreasonable" except where there is a showing of a "market dominance" by the carrier.

> Under the 4R Act, the ICC now has jurisdiction to review a rate only if it determines that the carrier can exclude effective competition to the extent that the carrier has "market dominance," defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies."[5]

The 1976 legislation was enacted because "many of the justifications for extensive regulation of railroad rates no longer existed."[6]

[5] *Western Coal Traffic League* v. *United States*, 719 F.2d 772, 775 (5th Cir.), *cert. denied*, 462 U.S. 1110 (1983). *See* 49 U.S.C. § 10709 (1985). In the *WCTL* case, the Fifth Circuit Court upheld the Commission's market dominance standards despite challenges by shipper interests.

[6] *WCTL* v. *United States*, 719 F.2d at 775.

By the 1980 Staggers Act, Congress further limited the Commission's substantive authority over rates. The act set jurisdictional thresholds by requiring a finding that given rates are in excess of the applicable "cost recovery percentage" before the Commission has authority to review the rates. If the rates do not exceed the "cost recovery percentage," then the rail carrier is presumed not to have "market dominance," and the Commission cannot determine the reasonableness of the rate. Even if the rate is above the threshold, the Commission must still determine whether market dominance exists before proceeding with reasonableness review. See 49 U.S.C. § 10709 (1985).[7]

Finally, the Staggers Act, which specifically authorized rail contract rates, provides that the Commission's very limited review of those rates does not ordinarily include review for "unreasonable discrimination." 49 U.S.C. §§ 10713(d), 10741(f) (1985). The Commission cannot, for instance, review coal transportation contracts for their discriminatory effect. *Id.* Contracts by their very nature lessen the need for regulatory supervision, assuming a modicum of equal bargaining power. Significantly, the conference report to the Staggers Act expressly affirms that "[t]he existing Federal antitrust laws apply" to section 208 of the Staggers Act, 49 U.S.C. § 10713, the section which authorized contract rates.[8]

The 4R and Staggers Acts, by deregulating rail rates, evince Congress' intent to allow "competition

[7] *See also WCTL* v. *United States*, 719 F.2d at 777 (Staggers Act, a "second major deregulation statute," was "an effort to hasten railroad rate deregulation").

[8] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 101, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4133.

and the demand for services" to govern the setting of rail rates, "to the maximum extent possible." 49 U.S.C. § 10101(a)(1) (1985). The legislative history underlying the two acts shows the congressional purpose to supplant regulation with competition as the principal restraint on railroad pricing and the principal means for protecting the shipping public from railroad market power.

The conference report on the 4R Act states that the purpose of the Act is "to provide an extensive overhaul of railroad rate regulation. . . . The provisions eliminate needless or harmful regulatory constraints on railroads, and they prescribe ratemaking practices which will *encourage effective competition* and protect consumers."[9] Similarly, the conference report to the Staggers Act explains that:

> The Conferees find that historically the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads. . . . However, *today, most traffic is competitive* and many of the Government regulations affecting railroads have become unnecessary and inefficient.[10]

As to the application of the antitrust laws, the Senate Commerce Committee, reporting out its version of the 4R Act in 1975, wrote that:

> If the railroads are to be treated more as a competitive industry with respect to pricing, then the industry must be treated more like a competitive industry with respect to antitrust policy.[11]

[9] S. Rep. No. 595, 94th Cong., 2d Sess. 134, *reprinted in* 1976 U.S. Code Cong. & Ad. News 148, 149 (emphasis added).

[10] H.R. Rep. No. 1430, *supra*, at 79, 1980 U.S. Code Cong. & Ad. News at 4110-11 (emphasis added).

[11] S. Rep. No. 499, 94th Cong., 1st Sess. 14 (1975).

The conference report on the 4R Act notes that, while the market dominance limitations on ICC regulation would lead to more competitive pricing, the changes were not intended "to authorize or to be applied to permit predatory competitive conduct."[12] If deregu-

[12] S. Rep. No. 595, *supra*, at 134, 1976 U.S. Code Cong. & Ad. News at 149. For further evidence that Congress intended Staggers Act deregulation of rail rates to be accompanied by heightened application of the antitrust laws, *see To Reform the Economic Regulation of Railroads: Hearings on S. 796 Before the Subcommittee of Surface Transportation of the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 251 (1979) (statement of Robert E. Gallamore, Federal Railroad Administration) ("We expect to see railroads effectively regulated by market forces and where competition does not limit their power, they will continue to be subject to antidiscriminatory and predatory price provisions, as well as Federal antitrust laws"); *Id.* at 546-47, 1343 (Statements of Donald F. Flexnor, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice) (railroads subject to full effect of antitrust laws, with possible exception of the Robinson-Patman Act; predatory pricing by railroads may be a violation of the Sherman Act "as an attempt to monopolize"); *Id.* at 1325 (statement of David I. Wilson, Asst. Director, Bureau of Competition, Federal Trade Commission) (a "railroad which has monopoly power . . . is subject to Sherman Act § 2"); *Regulatory Reform Legislation for the Rail Industry: Hearings on H.R. 4650 Before the Subcommittee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 4 (1980) (statement of William B. Johnson, Asst. Sec. for Policy and International Affairs, Dept. of Transportation) ("[T]he antitrust laws apply fully to unapproved agreements, including agreements knowingly entered into that are beyond the scope of ICC approved agreements"); 126 Cong. Rec. 17792 (1980) (statement of Rep. Madigan, co-author of rail bill) ("Q. Are railroads subject to the antitrust laws? A. Yes, except in those well-defined areas which permit certain practices not generally permitted under the antitrust laws. For example, the interdependent nature of the railroad industry necessitates collective rate bureau agreements").

lation and competition are to work, then the antitrust laws must be enforced. Competition is to protect the shipper, and the antitrust laws are to protect competition.

In sum, Congress has removed a large portion of the statutory basis for the *Keogh* decision. Many rail rates are completely deregulated now. As long as a given rate is below the jurisdictional threshold, or as long as the railroad lacks market dominance, the rate the railroad prescribes is the rate allowed under the Interstate Commerce Act. Congress has decreed that, at least for most contract rates, there is no basis for a claim of discrimination.

II. Rail Rates Are No Longer Approved By The ICC

The Court's decision in *Keogh* was based on the conflict between the regulatory and antitrust regimes. The Court held simply that private treble damage actions could not be predicated on a challenge to rates *filed and approved* by the ICC, because such rates are presumptively lawful and "reasonable."[13] As the Court subsequently made clear in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222 (1966), however, private antitrust actions are not precluded where an award of damages "would not interfere with any future action of the Commission." Antitrust exposure no longer interferes with ICC action on rail rates for most large volume movements. Congress has deregulated most of this business, and the ICC has followed Congress' lead with a vengeance.

[13] 260 U.S. at 160-61. *Accord, Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968).

Large volume rail rates are negotiated, often over an extended period of time, with captive shippers rarely having much leverage in those negotiations. If the negotiations lead to a contract, that contract is signed and *filed* with the ICC, 49 U.S.C. § 10713(b) (1985). The briefest of summaries are published about such contracts, *see* 49 C.F.R. §§ 1039.3, 1300.313 (1983), and they are subject to challenge in only exceedingly limited circumstances, 49 U.S.C. § 10713(d) (1985). Unlike the rates that were "approved" in *Keogh*, contracts are not ordinarily even subject to ICC "approval."

Assuming the shipper and carrier cannot agree on a contract, the railroad eventually files a tariff. It is then up to the shipper to decide whether there are any possible grounds for challenging the rate and other terms. 49 U.S.C. § 10707 (1985). Coal shippers, at least, today almost invariably choose not to pursue challenges to rates before the ICC, for the simple reason that they have virtually no chance of prevailing.[14] As a result tariffs are often "filed" with the Commission; they are rarely "approved" and thus

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[14] As ICC Administrative Law Judge Hopkins despairingly noted in a decision in January of 1984:

> Using the present method of arriving at a finding as to which carriers are revenue adequate it will be difficult if not impossible for any carrier to be considered revenue adequate. *It therefore does not appear presently feasible for a finding to be made that a complained of rate is unreasonably high.*
>
> • • •
>
> The Commission has not to my knowledge, since the passage of the Staggers Act, found a rate complained of to be above a maximum reasonable level.

Consumers Power Co. v. *Norfolk & Western Railroad Co.*, ICC Dkt. No. 378545, slip op. at 9-10 (January 4, 1984) (emphasis added).

rarely pose any conflict with ICC action to be avoided under the *Keogh* analysis.

The ICC has taken several steps to implement Congress' rate deregulation of coal rates, steps which further lessen the need for or chances of ICC "approval." The ICC, first, expansively defined competition for purposes of making market dominance determinations; the Commission allows consideration of product and geographic competition even where a given movement of, say, coal has no realistic competition. *See WCTL* v. *United States*, 719 F.2d 722. As a result shippers of coal, even between a specific mine and a specific powerplant, often are deemed to have competition and thus are not subject to market dominance.[15] The ICC has also endorsed "differential pricing" for rail rates, under which some rates are set at levels "exceeding fully allocated costs in order to compensate for those rates which must be set at less than fully allocated costs to meet competition from other transportation modes."[16] Differential pricing is a fact of life now at the ICC; the policy further restricts shipper challenges to rail rates, since it does away with shipper arguments that rates greatly above fully allocated costs are unfair or unreasonable.

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[15] As a result the ICC determines that it does not have jurisdiction to review the reasonableness of the rates. *See* 49 U.S.C. § 10709 (1985). *See also Burlington Northern R. Co.* v. *I.C.C.*, 679 F.2d 934, 936 (D.C. Cir. 1982), *cert. denied*, —— U.S. ——, 104 S. Ct. 2150 (1984).

[16] *Potomac Electric Power Co.* v. *I.C.C.*, 744 F.2d 185, 193 (D.C. Cir. 1984), *quoting Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1148 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

The ICC, finally, recently published its policy in *Coal Rate Guidelines, Nationwide.*[17] The Commission adopted "constrained market pricing" for coal rates, a variation of Ramsey pricing, and provided the coal railroads with further leeway in their demands for higher revenues. Under the Commission's new pricing formula, market forces determine the share of costs to be borne by different shippers, albeit with certain limited constraints imposed by the ICC. It is interesting to note that the Commission anticipates limited application of its *Coal Rate Guidelines,* for three reasons: (1) the Commission's rate jurisdiction is "circumscribed by statute" and "*less than 20 percent* of rail revenues from coal traffic are derived from traffic for which the revenue to variable cost ratio exceeds the jurisdictional threshold"; (2) traffic under contract is "not subject to Commission scrutiny"; and (3) section 229 of the Staggers Act, the grandfather clause, eliminates review of rates in effect prior to enactment of the Staggers Act.[18] With the Commission itself finding that only 20 percent of coal rail traffic is subject to reasonableness review, there is hardly cause for widespread concern over conflicts between Commission jurisdiction and antitrust actions.

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[17] Ex Parte 347, (Sub-No. 1) slip op. (August 8, 1985), *appeal docketed sub nom. Consolidated Rail Corp.* v. *United States,* No. 81-3080 (3rd Cir.).

[18] *Id.*, slip op. at 3 (emphasis added).

CONCLUSION

Congress has told shippers to rely on competition to ensure the equity of rail rates. If shippers must rely on competition, then railroads ought to be forced to accept the implications of a deregulated marketplace, including heightened exposure to private antitrust suits. The Court should overturn or modify *Keogh* as a product of a different era in carrier rate regulation. The reasons for the ruling have largely disappeared.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP., *Petitioners*,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, INC., DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should overrule Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922).

No. 85-21

In The
SUPREME COURT of the UNITED STATES

October Term, 1985

Square D Company And Big D
Building Supply Corp.,

Petitioners,

v.

Niagara Frontier Tariff
Bureau, Inc., et al.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, INC., DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of the Court, amici seek leave to file

the attached brief amicus curiae in support of petitioner. Amici have a vital interest in the issues presented by this case and will present this Court with relevant facts and arguments unlikely to be put forth by the parties. 1/

Amici--two dock companies and a trucking company--are among the plaintiffs in a consolidated antitrust litigation denominated MDL 587, the Lower Lake Erie Iron Ore Antitrust Litigation. Various railroad companies are defendants in MDL 587, which is currently pending before the United States District Court for the Eastern District of Pennsylvania.

The amici sought to compete with the MDL 587 defendants in the business of providing dock services for iron ore at

1/ The parties have not consented to the filing of the attached brief.

Lake Erie ports and the business of moving the ore overland to steel mills. However, the amici were foreclosed from competing by acts and practices of the MDL 587 defendants, including four railroads which pleaded nolo contendere to a criminal indictment based on the same acts alleged by amici. The convictions entered upon the nolo plea were upheld by the District of Columbia Circuit on an appeal by one of the railroads, which unsuccessfully argued that the railroads' actions were immune from the antitrust laws under the Interstate Commerce Act. United States v. Bessemer and Lake Erie R. Co., 717 F.2d 593 (D.C. Cir. 1983).

In MDL 587, and in previously filed but nearly identical litigation pending in the Sixth Circuit upon appeals from decisions of the district court in Cleve-

land, 2/ the railroad defendants are arguing that antitrust treble damage actions are barred by Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922), the decision whose continued vitality is at issue here. The railroads' argument has already been made against would-be competitors in the previously filed Sixth Circuit litigation and against shippers in the MDL 587 litigation, and it is a certainty that the argument will also be made against would-be competitors in the MDL 587 litigation. 3/

2/ Pinney Dock & Transport Company v. Penn Central Corp. et al., United States Court of Appeals for the Sixth Circuit, Nos. 84-3653, 84-3654, 84-3876 and 84-3877. Some of the decisions of the district court in Pinney have been published. They can be found at 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607; 1983-2 Trade Cases ¶65,608; 1982-83 Trade Cases ¶¶65,053 and 65,054; and 1982-1 Trade Cases ¶64,687.

3/ The MDL 587 court upheld the Keogh argument against shippers. In Re Lower

(footnote continued on next page)

Although the Keogh doctrine was born in the context of suits by shippers, and was long asserted almost exclusively in that context, efforts to use it to bar suits by would-be competitors have occurred with some frequency in large antitrust cases during recent years. 4/ Those efforts are relevant to this Court's

(footnote continued from previous page)

Lake Erie Iron Ore Antitrust Litigation, MDL 587, Memorandum and Pretrial Order No. 4, decided June 5, 1985. Its opinion was cited to this Court by both the government, in its amicus brief urging that certiorari be granted in this case, and by the respondents, in their main brief opposing certiorari. Respondents also appended the decision to their brief in opposition. Joint Brief In Opposition, Appendix B.

4/ See, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. den., 459 U.S. 1227 (1983); City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981); Essential Communications Systems, Inc. v. AT&T et al., 610 F.2d 1114 (3d Cir. 1979); Frontier Enterprises, Inc. v. Amador Stage

(footnote continued on next page)

assessment of whether Keogh should be overruled. But points specifically pertinent to this use of Keogh against would-be competitors are unlikely to be developed by the parties to this case, since Keogh was applied here to bar suit by shippers, not competitors. Thus, the petition for certiorari understandably does not mention matters specifically pertinent to the use of Keogh against foreclosed competitors, and the brief in opposition studiously

(footnoted continued from previous page)

Lines, Civil No. S-83-940 MLS, E.D. Cal., decided October 2, 1985; Transkentucky Transportation Railroad et al. v. Louisville and Nashville Railroad Co. et al., 1983-2 Trade Cases ¶65,476, (E.D. Ky. 1983); Litton Systems v. AT&T, 487 F. Supp. 942 (S.D. N.Y. 1980), aff'd. 700 F.2d 785 (2d Cir. 1983), cert. den. 464 U.S. 1073 (1984); Marnell v. United Parcel Service of America, 260 F.Supp. 391 (N. D. Cal. 1966).

ignores such matters. 5/ It is the omitted matters, pertinent to the relatively frequent recent use of Keogh to try to bar antitrust suits by foreclosed competitors, that amici wish to bring to the attention of the Court.

The omitted matters amici wish to discuss are of great importance to the national economy. For cases in which Keogh has been asserted in an effort to bar antitrust actions by competitors have involved basic industries such as electric power, telephonic communications, and railroads. In such industries, one or a few companies have possessed and often continue to possess monopolistic or semi-

5/ For example, in arguing that the Keogh doctrine has been "uniformly" applied by the courts, the brief in opposition confines itself to saying that no court has ever allowed a shipper to sue despite Keogh, and ignores the fact that numerous courts have allowed competitors to sue despite Keogh. Joint Brief In Opposition, pp. 6, 8.

monopolistic power at one or more levels in the vertical chain of production and distribution. For example, the American Telephone and Telegraph Company long possessed total power in various markets for the manufacture and sale of telephone equipment, the installation and servicing of such equipment, the provision of local telephone service, and the provision of long distance service. Similarly, electric power companies often possess regional monopolies over both the production of electricity and its transmission over long distance wires. Railroads--as in the iron ore cases--often possess individual or joint monopolies over both dock facilities and inland transportation.

When companies in basic industries have monopolistic or semi-monopolistic power at one or more levels in the chain of

production and distribution--i.e., when they possess a bottleneck monopoly--they can use the power they possess at a bottleneck monopoly level to bar companies that wish to compete with them at a different level. Contrary to the goals of the antitrust laws, bottleneck monopolists are thereby able to stifle technological innovation and cheaper prices, and to preserve their dominion over entire industries.

This is precisely what occurred in reported cases in which Keogh was asserted to try to block antitrust damage suits by foreclosed competitors. AT&T, for example, used the power it possessed at various levels of the telephone industry to bar the entrance of companies that wished to sell technologically advanced telephone equipment or to provide alternative long dis-

tance service. 6/ Electric power companies have used their dominion over transmission wires to bar companies that wished to compete for retail sales of electricity. 7/ Railroads used their power over dock facilities to foreclose companies that wished to provide competing means of inland transportation, and used their power over inland transportation to foreclose companies that wished to provide competing, technologically advanced dock facilities. 8/

6/ AT&T's actions are extensively discussed in United States v. AT&T, 524 F.Supp. 1336 (D.D.C. 1981); and Litton Systems, Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983), cert. den., 464 U.S. 1073 (1984).

7/ See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

8/ See United States v. Bessemer & Lake Erie R. Co., supra; Pinney Dock & Transport Co. v. Penn Central Corp. et al., supra, 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607, 1983-2 Trade Cases ¶65,608.

Because they are in regulated industries, telephone companies, electric power companies and railroads have used tariffs as a major vehicle for accomplishing their purpose of barring competitors and stifling technological innovation and cheaper prices. AT&T, for example, imposed a tariff requirement under which an unnecessary and expensive interface device had to be used to connect equipment of competing manufacturers to AT&T's telephone lines. It also employed interconnection tariffs that effectively barred companies such as MCI from providing competing long distance telephone service. Electric power companies have used tariffs to impose a price squeeze upon would-be retail competitors. 9/ Railroads have prevented competition from technologically

9/ See, e.g., City of Kirkwood v. Union Electric Co., supra; City of Groton v. Connecticut Light & Power Co., supra.

more advanced non-railroad docks (called "private docks") by refusing to file tariffs providing the same freight rates for iron ore shipped from the private docks as for iron ore shipped from the railroad docks, thus leaving the private docks with only far higher freight rates that made it impossible for them to compete with the railroad docks.

When the anticompetitive conduct of bottleneck monopolists has been challenged in antitrust cases brought by foreclosed competitors, the defendants have often claimed immunity under Keogh because they acted by means of filed tariffs, or because they acted by means of refusals to file tariffs, or because the lost profits of foreclosed competitors assertedly could have depended on rates that would have been

set forth in tariffs. 10/ Thus, the Keogh doctrine has been invoked to try to shield massive anticompetitive conduct that barred competition and innovation in fundamental industries, and has been invoked not only when defendants have filed tariffs, but when they have not done so, and when tariffs assertedly could have affected competitors' profits.

It is thus clear that the matters amici wish to discuss are of serious import to the economy and should be brought to the attention of this Court when it is considering the future of the Keogh doctrine. Amici therefore wish to submit the attached amicus curiae brief to aid the Court in its consideration of this case,

10/ The defendants have also claimed immunity under the regulatory statutes governing them.

and respectfully move that leave to file be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iv

INTEREST OF THE AMICI CURIAE..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 9

I. IN THE RAILROAD, TELEPHONE AND ELECTRIC POWER INDUSTRIES, COMPANIES WITH BOTTLENECK MONOPOLY POWER AT ONE LEVEL IN THE CHAIN OF PRODUCTION AND DISTRIBUTION HAVE USED THAT POWER TO FORECLOSE COMPETITION AT OTHER LEVELS, AND HAVE SUBSEQUENTLY SOUGHT TO USE KEOGH AS A BAR TO DAMAGE ACTIONS BROUGHT BY FORECLOSED COMPETITORS.....9

A. Introduction..... 10

B. The Foreclosure of Vessel, Dock and Trucking Companies From The Iron Ore Business, And The Resulting Criminal And Civil Actions..... 11

C. The Economic Background Of The Railroads' Actions, And Specific Anticompetitive Steps Taken By The Railroads..... 15

Page

D. Bottleneck Monopoly Power Possessed At One Level Of Basic Industries Has Been Used To Foreclose Competition At Other Levels..... 20

E. Bottleneck Monopolists Have Sought To Use Keogh To Obtain Immunity From Antitrust Damage Actions Challenging The Anticompetitive Conduct By Which They Foreclosed Competitors..... 25

II. THIS COURT SHOULD MAKE CLEAR THAT KEOGH CANNOT BE USED IN ANY WAY TO PRECLUDE DAMAGE ACTIONS BY FORECLOSED COMPETITORS..... 32

A. The Holding Of And The Major Reasons Underlying Keogh Are Inapplicable To Suits By Competitors..... 35

B. The Application Of Keogh To Bar Suits By Competitors Is Contrary To This Court's Jurisprudence Regarding Implied Immunities And Would Impermissibly Extend Immunity Beyond The Congressional Grant..... 39

Page

C. The Use Of Keogh To Bar Suits By Competitors Is Inconsistent With Requirements Of The National Economy And With Sound Antitrust Policy..... 41

CONCLUSION 44

TABLE OF AUTHORITIES

CASES

	Page
City of Groton v. Connecticut Light & Power Co., 662 F.2d 921(2d Cir. 1981)	25, 26, 28
City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982)	25, 26, 28
Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. den., 459 U.S. 1227 (1983)	26
Essential Communications Systems, Inc. v. AT&T, et al., 610 F.2d 1114 (3d Cir. 1979)	26
Frontier Enterprises, Inc. v. Amador Stage Lines, Civil No. S-83-940 MLS, E.D. Cal., decided October 2, 1985	26
Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945)	33
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	40
Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922)	passim
Litton Systems, Inc. v. AT&T, 487 F.Supp. 942 (S.D. N.Y. 1980), aff'd. 700 F.2d 785 (2d Cir. 1983), cert. den., 464 U.S. 1073 (1984)	23, 26, 27

	Page
Marnell v. United Parcel Service of America, Inc., 260 F.Supp. 391 (N.D. Cal. 1966)	26, 27, 33
Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958)	43
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	24, 25, 40
Pinney Dock & Transport Co.v. Penn Central Corp. et al., 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607 (N.D. Ohio 1983); 1983-2 Trade Cases ¶65,608 (N.D. Ohio 1983)	11, 33
Transkentucky Transportation Railroad et al. v. Louisville & Nashville Railroad Co., 1983-2 Trade Cases ¶65,476 (E.D. Ky.1983)	26, 27
United States v. American Telephone & Telegraph Co., 461 F.Supp. 1314 (D.D.C. 1978), 524 F.Supp. 1336 (D.D.C. 1981)	23, 26
United States v. Bessemer and Lake Erie Railroad Co., 717 F.2d 593 (D.C. Cir. 1983)	11, 13, 25
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	40

No. 85-21

In The
SUPREME COURT of the UNITED STATES

October Term, 1985

Square D Company And Big D
Building Supply Corp.,

Petitioners,

v.

Niagara Frontier Tariff
Bureau, Inc., et al.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Second Circuit

AMICUS CURIAE BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The interest of the amici has been set forth in the foregoing motion for leave to file this brief.

SUMMARY OF ARGUMENT

A. Recent efforts to use Keogh to bar antitrust suits by foreclosed competitors are relevant to this Court's assessment of the future of the Keogh doctrine. Such efforts have occurred with relative frequency in large antitrust cases. The goal of those efforts has been to try to immunize massive anticompetitive conduct that foreclosed and delayed technological innovation or lower prices in basic industries such as the telephone, electric power and railroad industries.

In industries such as these, companies often possess "bottleneck" monopoly power at one or more levels in the vertical chain of production and distribution. This "bottleneck" power frequently is used to

foreclose companies at other levels. As shown by litigation in the last decade alone, railroads have used bottleneck power over docks and rail lines to foreclose companies which sought to provide vessel transportation, competing dock services or competing overland transportation for iron ore, electric power companies have used bottleneck power over long distance transmission wires to foreclose competitors that sought to make retail sales of electricity, and AT&T used bottleneck power possessed at several levels to foreclose competing manufacturers of long distance equipment and competing providers of long distance telephone service.

B. When the anticompetitive actions of bottleneck monopolists have been challenged in antitrust cases, they have argued that their actions are immunized from the antitrust laws by regulatory statutes and

that damage suits are barred by Keogh. The arguments for immunity under regulatory statutes have failed. The defendants have thus been reduced to reliance on Keogh to try to obtain the immunity from antitrust damages that is not provided by their governing regulatory statutes.

In attempting to obtain immunity under Keogh, defendants have made arguments ranging from the conventional to the expansive and inventive. It has been urged that Keogh bars suits by foreclosed competitors because plaintiffs were claiming that high tariff rates precluded them from entering business or competing effectively, because plaintiffs were asserting that defendants' refusal to file tariffs precluded plaintiffs from entering a business, or because the exact amount of plaintiffs' lost profits assertedly could have depended in part

on the extent to which the defendants would have filed new, lower tariff rates.

C. The efforts to use Keogh to bar antitrust damage actions by foreclosed competitors have been rejected by numerous courts. These rejections are correct. Thus, if Keogh is not totally overruled, as amici believe it should be, the Court should make clear that it cannot be used in any way to bar suits by foreclosed competitors.

1. The holding of and major reasons for Keogh were directed towards suits by shippers, and have no bearing on suits by competitors. Keogh held that the legal rights of shippers are measured by published tariffs. It said that otherwise Congress' paramount purpose of preventing discrimination against shippers might be defeated. Such defeat could occur because an antitrust recovery might, like a rebate,

give a plaintiff shipper a preference over other shippers.

Thus the ruling and prime rationale of Keogh were confined to barring suits by shippers, not competitors.

Furthermore, Keogh's concern that rates relied upon by plaintiffs might be hypothetical was specifically and in terms related to the fear that a hypothetical rate propounded by shipper plaintiffs might be discriminatory against other shippers who did not file suit. Thus the concern was not addressed to and has no effect upon suits by foreclosed competitors.

There also are other reasons why the fear of hypothetical rates expressed in Keogh cannot preclude antitrust damage suits by foreclosed competitors. Today it is common in antitrust litigation to determine the charges, prices and profits that would have prevailed in the absence of

anticompetitive actions. Also, the lost profits of a foreclosed competitor often depend quite heavily on costs and expenses other than tariff rates.

2. This Court has often ruled that implied immunities from the antitrust laws are not favored, and will be found only when there is clear repugnancy between a regulatory scheme and the application of the antitrust laws. In the absence of such clear and irreconcilable conflict, the Court has been unwilling to extend immunity beyond the line marked by Congress. Application of Keogh to bar damage suits by competitors would run contrary to this jurisprudence. For such application would provide de facto immunity from damage suits where arguments for express or implied immunity under regulatory statutes have failed, and would thereby extend immunity beyond the Congressional grant.

3. Use of Keogh to bar suits by foreclosed competitors would enable bottleneck monopolists to foreclose competition, technological innovation and lower prices in basic industries, without having to fear that they will one day be called to account in treble damages. By eliminating one of the most powerful deterrents to anticompetitive conduct -- i.e., by eliminating treble damages -- the use of Keogh to prevent suits by competitors will encourage the kinds of competition-destroying, technology-retarding conduct that occurred in the railroad, telephone and electric power industries. To encourage such conduct is inconsistent with the needs of the national economy, which requires technological innovation and improvements that result in lower prices, and is inconsistent with antitrust policy because the antitrust laws are intended to

promote innovation and lower prices.

The inconsistency with the needs of the economy and with antitrust policy is heightened because there have been cases in which the conduct sought to be immunized by Keogh has been undertaken with maximum possible secrecy and because Keogh is invoked on an expansive basis. The use of Keogh to shield secret anticompetitive actions, and its use on an expansive basis, increase its capacity to immunize and thereby encourage conduct that retards technological innovation and lower prices.

ARGUMENT

I. IN THE RAILROAD, TELEPHONE AND ELECTRIC POWER INDUSTRIES, COMPANIES WITH BOTTLENECK MONOPOLY POWER AT ONE LEVEL IN THE CHAIN OF PRODUCTION AND DISTRIBUTION HAVE USED THAT POWER TO FORECLOSE COMPETITION AT OTHER LEVELS, AND HAVE SUBSEQUENTLY SOUGHT TO USE KEOGH AS A BAR TO DAMAGE ACTIONS BROUGHT BY FORECLOSED COMPETITORS

A. Introduction

As stated in the accompanying motion for leave to file, this brief is being submitted to acquaint the Court with matters pertinent to efforts to use the Keogh doctrine [1/] to bar antitrust suits by foreclosed competitors. Such efforts are highly relevant to the Court's assessment of the future of Keogh, including consideration of whether it should be overruled. For the efforts to use Keogh against competitors have occurred with relative frequency in recent years, and the goal of these efforts has been to try to immunize massive anticompetitive conduct that forestalled technological innovation or lower prices in industries such as

1/ Keogh v. Chicago and Northwestern Railway, 260 U.S. 156 (1922).

the electric power, telephone and railroad industries.

In order to provide the Court with a concrete illustration of recent attempts to use Keogh against competitors, amici shall begin by describing relevant particulars of one of these attempts, involving the handling and transportation of iron ore. [2/]

B. The Foreclosure of Vessel, Dock And Trucking Companies From The Iron Ore Business, And The Resulting Criminal And Civil Actions

In the 1950's, 1960's and 1970's, various ship, dock, and trucking companies sought to participate in the transportation

2/ Extensive judicial explanations of numerous iron ore matters described here by amici can be found in United States v. Bessemer & Lake Erie R. Co., 717 F.2d 593 (D.C. Cir. 1983); Pinney Dock & Transport Co. v. Penn Central Corp. et al., 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607 (N.D. Ohio 1983); and Pinney Dock & Transport Co. v. Penn Central Corp. et al., 1983-2 Trade Cases ¶65,608 (N.D. Ohio, 1983).

and handling of iron ore arriving at Lake Erie ports. The ship companies sought to participate in the business of transporting the ore over the Great Lakes to the Lake Erie ports, the dock companies sought to participate in the business of providing dock handling services for the ore, and the truck companies sought to participate in the business of transporting the ore overland from docks to steel mills. Participation in the relevant businesses by docks and truckers would have made them direct competitors of a number of eastern railroads that own docks providing ore handling services and that carry ore from docks to steel mills.

For many years, however, the ship, dock and trucking companies were foreclosed from participation in the relevant businesses by actions of the railroads. Such

actions began in the mid 1950's and continued for approximately twenty-five years. In pending antitrust suits these actions are alleged to have been jointly monopolistic in character and to have been taken pursuant to a secret conspiracy.

The railroads' conspiratorial actions gave rise to a criminal antitrust suit brought by the United States and based in major part on documents subpoenaed from the railroads' files. Four of the railroads pleaded nolo contendere. The convictions entered upon the pleas of nolo were upheld by the District of Columbia Circuit on an appeal by one of the railroads, which argued unsuccessfully that the railroads' actions were immunized from the antitrust laws by the Interstate Commerce Act. United States v. Bessemer and Lake Erie R. Co., 717 F.2d 593 (D.C. Cir. 1983).

When discovered, the railroads' actions also gave rise to civil antitrust suits. Two of the civil cases are presently pending in the Sixth Circuit upon appeals from decisions of the federal district court in Cleveland. Pinney Dock & Transport Co. et al. v. Penn Central Corp. et al., United States Court of Appeals for the Sixth Circuit, Nos. 84-3653, 84-3654, 84-3876, and 84-3877. The rest of the cases, including ones brought by amici, have been consolidated for pretrial proceedings in the United States District Court for the Eastern District of Pennsylvania, and are denominated MDL 587, the Lower Lake Erie Iron Ore Antitrust Litigation. Both the Sixth Circuit litigation and MDL 587 include suits by would-be competitors, such as amici, who were foreclosed by the railroads' actions

from entering the relevant lines of business. 3/

C. The Economic Background Of The Railroads' Actions, And Specific Anticompetitive Steps Taken By The Railroads

The criminal indictment and the civil complaints have alleged the same jointly monopolistic and conspiratorial actions by the defendant railroads. The economic background of these actions is as follows.

For decades, mud-like iron ore was transported across the Great Lakes to Lake Erie railroad docks in vessels called bulkers. These boats were unloaded at the railroad docks by means of huge cranes, usually called huletts. Each crane had a clamshell-like claw that dipped into the boat to grab a load of iron ore, which was

3/ One of the amici, Ambrosia Trucking, was finally able to enter the business of hauling ore overland in 1976.

then deposited on the dock. After the ore was unloaded, it was moved to steel mills via railroad "line hauls."

Beginning in the 1950's, iron ore began to be shipped across the Great Lakes in pelletized rather than mud-like form. Pelletized ore can be carried in technologically advanced boats which unload themselves by means of an internal conveyor belt and a boom that deposits the ore on the dock. These "self unloaders" render unnecessary the large and expensive cranes used by the railroad docks to unload bulkers. And, because they unload themselves, the self unloaders could be received at non-railroad docks (called private docks) that did not have or need the cranes possessed by railroad docks. Because they did not have to invest in these cranes, the private docks could charge less than railroad docks.

The potential use of self unloaders and private docks was regarded as a serious threat by the railroads. For they endangered the railroads' stranglehold over the business of providing dock services for iron ore. Also, if self unloaders went to private docks, trucks would ultimately be able to participate in the inland transportation of ore by carrying ore from the private docks.

The railroads therefore determined to prevent the use of self unloaders, private docks and trucks. By means of secret meetings and private correspondence that began in the mid 1950's and continued for approximately twenty-five years, they conspiratorially decided to and did take numerous steps to preclude self unloaders from being used to carry ore, to prevent private docks from handling ore in competition with railroad docks, and to

preclude trucks from carrying ore in competition with rail hauls. Many of the conspiratorial steps involved the use of tariffs. The steps included the following measures:

(1) Railroads refused to grant the same "commodity" rates for line hauls of ore from private docks as applied on line hauls of ore from railroad docks. The refusal to grant private docks a "commodity" rate rendered them unable to compete with railroad docks. For in the absence of a commodity rate, the applicable rate from private docks was a "class" rate which was often two to three times higher than the "commodity" rate applicable from railroad docks.

(2) Railroads refused to sell or lease land to companies that intended to establish private docks to handle self unloaders.

(3) Railroad docks refused to establish dock handling rates for self unloaders that reflected the actual economic savings realized because those boats did not need to be unloaded by large cranes but instead unloaded themselves.

(4) Railroads refused to allow self unloaders to discharge ore at railroad docks.

(5) Railroads levied arbitrary charges upon trucks that sought to pick up ore at railroad docks or wholly prohibited such pick-ups.

(6) Railroads sought to harass truck movements of ore.

The railroads' conspiratorial actions to prevent the use of self unloaders, private docks and trucks were highly successful. For twenty years, until the mid 1970's, the self unloaders, private docks and trucks were kept out of the

business of transporting and handling ore. Thereafter, the participation of private docks and truckers was kept limited. The railroads' anticompetitive actions thus stifled technological innovation, cheaper prices, and direct competition with the railroads in the businesses of providing dock handling services for ore and transporting ore overland to steel mills.

D. Bottleneck Monopoly Power Possessed At One Level Of Basic Industries Has Been Used To Foreclose Competition At Other Levels

Companies with monopoly power at a particular level in the chain of production and distribution sometimes use that power to foreclose competition at the monopolized level. In certain industries, however, monopoly power possessed at one or more levels can also be used to foreclose competition at other levels. The latter use of monopoly power occurred in the Lake

Erie iron ore cases. By taking actions to keep out self unloaders, private docks and trucks, the railroads there used monopoly power at two levels to stifle companies at three levels in the chain of transportation for ore and to prevent competition.

The railroads possessed monopoly control over the iron ore dock business on Lake Erie and over the business of transporting ore overland. By failing to establish dock rates that reflected the savings made possible by self unloaders, and by barring these vessels from railroad docks, the railroads used their monopoly power over the dock business to discourage and foreclose the use of self unloaders. By refusing to grant iron ore "commodity" line haul rates to private docks, the railroads used their monopoly power over inland transportation to foreclose competition from private docks. And by levying

arbitrary charges against or wholly prohibiting truck pick-ups of ore at railroad docks, the railroads used their monopoly power over the dock business to foreclose competition from trucks.

The use of monopoly power possessed at one level of a vertical chain of production and distribution to bar competitors from other levels has become an all too frequent occurrence in basic industries. Thus, in the last decade alone, litigation has shown that such "bottleneck" monopoly power has been extensively used to preclude competitors, technological innovation and/or cheaper prices in the telephone and electric power industries, as well as the railroad industry.

In the telephone industry, American Telephone and Telegraph Company long possessed total monopoly power in numerous

markets for the manufacture and sale of telephone equipment, the purchase, installation and servicing of equipment, the provision of local telephone service over local phone lines, and the provision of long distance service over long distance lines. Litigation brought by competitors and by the United States Government--whose lawsuit led to the break-up of AT&T--showed that AT&T had extensively used its bottleneck power over various levels of the industry to bar competitors and innovation at other levels. 4/ For example, AT&T used its power over the purchase, installation

4/ AT&T's actions are extensively discussed in United States v. AT&T, 524 F.Supp. 1336 (D.D.C. 1981); and Litton Systems, Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983); cert. den., 464 U.S. 1073 (1983).

and servicing of equipment to foreclose non-AT&T manufacturers, and used its power over local telephone lines to foreclose competing manufacturers and competing providers of long distance service (such as MCI).

In the electric power industry, power companies often possess regional monopoly power over both the production of electricity and its transmission over long distance wires. The companies' dominion over transmission wires has often been used to bar firms that wish to compete for retail sales of electricity; such preclusion has been accomplished by refusing to transmit (or "wheel") power to the retail competitors [5/] or by imposing a price squeeze upon

5/ See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

them. [6/]

E. Bottleneck Monopolists Have Sought To Use Keogh To Obtain Immunity From Antitrust Damage Actions Challenging The Anticompetitive Conduct By Which They Foreclosed Competitors

When the anticompetitive conduct of bottleneck monopolists has been challenged in antitrust cases, they have argued that their actions are expressly or impliedly immune under regulatory statutes. They also have argued that damage suits are barred by Keogh. The argument for immunity under regulatory statutes has largely failed, [7/] since the pertinent statutes generally are not designed to protect the

6/ See, e.g., City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981).

7/ E.g., Otter Tail Power Co. v. United States, supra; United States v. Bessemer &

(Footnote continued on next page)

use of monopoly or semimonopoly power at one level to bar competitors at another level. Thus the bottleneck monopolists are reduced to reliance on Keogh to try to obtain the immunity from antitrust damages that is not provided by their governing regulatory statutes. 8/

(Footnote continued from previous page)
Lake Erie R. Co., supra; Transkentucky Transportation Railroad, et al. v. Louisville and Nashville Railroad Co., 1983-2 Trade Cases ¶65,476 (E.D. Ky. 1983); Litton Systems, Inc. v. AT&T, 487 F.Supp. 942 (S.D. N.Y. 1980), aff'd, 700 F.2d 785 (2d Cir. 1983), cert. den., 464 U.S. 1073 (1984); United States v. AT&T, 461 F.Supp. 1314 (D.D.C. 1978); Marnell v. United Parcel Service of America, Inc., 260 F.Supp. 391 (N.D. Cal. 1966).

8/ E.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. den., 459 U.S. 1227 (1983); City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2nd Cir. 1981); Essential Communications Systems, Inc. v. AT&T, et al., 610 F.2d 1114 (3rd Cir. 1979); Frontier Enterprises, Inc. v. Amador Stage Lines, Civil No. S-83-940 MLS, E.D.
(footnote continued on next page)

In seeking to obtain immunity under Keogh, regulated monopolists, no matter how broad the panoply of their actions, essentially argue that rate and tariff actions are the root cause of any and all alleged anticompetitive harm and that their conduct is therefore immunized by the Keogh doctrine. Basically, they try to turn each case into a rate and tariff matter, even if they also took non-rate or non-tariff actions. They alternatively argue, sometimes correctly, that rate and tariff actions were the preponderant cause of a competitor's injury. Therefore, they say, under Keogh the competitor cannot recover damages for most of the harm it suffered.

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Cal., decided October 2, 1985; Transkentucky Transportation Railroad et al. v. Louisville and Nashville Railroad Co., supra; Litton Systems, Inc. v. AT&T, supra, note 7; Marnell v. United Parcel Service of America, supra.

Arguments that rates and tariffs are the root or preponderant cause of harm, and that anticompetitive conduct is therefore wholly or largely immunized under Keogh, have ranged from the conventional to the inventive. In conventional form, the argument is that Keogh bars damages because the plaintiff is claiming that high tariff rates precluded it from entering a business or from competing effectively in the business. In the electric power business, for example, companies with bottleneck power have charged high wholesale tariff rates to firms that wished to compete with them for retail sales. 9/ These wholesale tariff rates have created a price squeeze that foreclosed the retail competitors.

9/ E.g., City of Kirkwood v. Union Electric Co., supra; City of Groton v. Connecticut Light & Power Co., supra.

When the competitors have sued, the bottleneck companies assert that Keogh bars damages because the competitive injury was caused by tariff rates.

A similar argument has been made in the Lake Erie Iron Ore cases. There it has been argued that suit by vessel companies is barred by Keogh because the foreclosure of self unloaders was accomplished by tariffs charging high dock handling rates, and that suit by private docks is barred because they were foreclosed by tariffs charging high "class" rates on shipments of ore from these docks.

In its more inventive forms, the argument based on Keogh has a number of versions. One is that suit by a foreclosed competitor is barred because his inability to enter business was caused by the defendant's failure to file a tariff rate

that would have allowed the foreclosed party to compete. Again, the iron ore cases exemplify this. There the defendants argue that Keogh bars suit by private docks because these docks were foreclosed by the railroads' refusal to grant the same low "commodity" rate on movements of ore from the private docks as on movements from railroad docks. Similarly, it is urged that Keogh bars suits by ship companies because self unloaders were foreclosed by a refusal to establish dock handling rates that reflected the actual dock savings attributable to self unloaders.

Another inventive version of the Keogh argument has also been offered in the iron ore litigation. This version is that Keogh precludes competitors such as private docks from obtaining damages for lost profits, because the exact amount of such profits

would have depended in part on the extent to which railroads would have filed lower dock tariffs that would have encouraged the construction and use of self unloaders. Put differently, the argument is that Keogh bars private docks from recovering their own lost profits because the precise amount of those profits allegedly would have depended on the tariff rates charged by railroad docks.

Thus, Keogh has been used in a number of ways to try to bar antitrust suits where bottleneck monopolists used power at one level to foreclose companies that wished to do business at another level--usually one at which the foreclosed company would have been a direct competitor of the monopolist. Such use of Keogh has ranged from claims that suit is precluded because based on the monopolist's filed rates, to claims that

suit is precluded because based on the monopolist's refusal to file rates, to claims that suit is precluded because the competitor's lost profits depend on the extent to which the monopolist would have filed new, lower rates.

II. THIS COURT SHOULD MAKE CLEAR THAT KEOGH CANNOT BE USED IN ANY WAY TO PRECLUDE DAMAGE ACTIONS BY FORECLOSED COMPETITORS

The efforts tc use Keogh to block antitrust damage suits by foreclosed competitors have been consistently rejected by numerous courts of appeal and district courts. 10/ Amici believe these lower court decisions are correct. 11/

10/ See cases in note 8, supra.

11/ Amici know of only one potential exception to the numerous lower court rejections of attempts to use Keogh to bar suit by foreclosed competitors. In the Pinney case the district court, after first ruling that suit by competitors was not barred by Keogh, later indicated on motion for reconsideration that damages would be

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precluded by the Keogh doctrine if they are dependent on hypothetical rates that would have been filed with the ICC by the railroads. Pinney Dock & Transport Co. v. Penn Central Corp. et al., 600 F.Supp. 859 (N.D. Ohio 1983). However, the Court subsequently appeared to be satisfied, at least as of the present, that damages would not depend on such rates. Pinney Dock & Transport Co. v. Penn Central Corp. et al., supra, Memorandum and Order of March 10, 1984.

Amici also note that antitrust defendants occasionally claim Keogh should be used to bar suits by foreclosed competitors because of this Court's decision in Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945). In that case the state of Georgia was held unable to bring a damage action because of Keogh, and defendants occasionally assert suits by competitors are therefore barred because Georgia had sued both as parens patriae for its citizens and as proprietor of a railroad. This argument is plainly incorrect. It has not even merited mention in most of the cases rejecting the use of Keogh to bar suits by competitors (see generally, cases cited in note 7, supra), and where mentioned by courts it has been summarily rejected because this Court treated Georgia as a shipper, not a competitor. Pinney Dock & Transport Co. v. Penn Central Corp. et al., supra, 600 F.Supp. at 879, 1983-2 Trade Cases ¶65,607, p. 69,031; Marnell v. United Parcel Service of America, supra, 260 F.Supp. at 406.

Amici further believe that for reasons elaborated by Judge Friendly in the decision below, by petitioners, and by the United States, Keogh should be totally overruled, so that it no longer will bar suit by any party, be the party an injured shipper or a foreclosed competitor. But amici also urge that, even if Keogh retains full or partial validity in suits by shippers, the Court should make clear that Keogh cannot be used in any way to preclude damage suits by competitors. The reasons are that use of Keogh to bar damage suits by foreclosed competitors is inconsistent with the holding of and the fundamental reasons for the Keogh opinion, is inconsistent with the limited nature of antitrust exemptions, expands immunity beyond Congressional grant, would enable bottleneck monopolists to thwart competi-

tion, innovation and cheaper prices with impunity from antitrust damage actions, and would thereby remove a prime deterrent to anticompetitive acts and thwart economic progress.

A. The Holding Of And The Major Reasons Underlying Keogh Are Inapplicable To Suits By Competitors

Keogh held that "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff....[T]his rate is made, for all purposes, the legal rate, as between carrier and shipper." 260 U.S. at 163 (emphasis added). The reason is that "otherwise the paramount purpose of Congress--prevention of unjust discrimination--might be defeated." Ibid. (Emphasis added.) For "[i]f a shipper could recover [antitrust] damages resulting from the exaction of a rate higher than that

which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a a preference over his trade competitors." Id. at 164. (Emphasis added.)

Thus, by its own express language, Keogh is confined to barring suits by shippers against carriers, and does not affect suits by competitors. Nor does the prime reason for barring suits by shippers apply to suits by competitors: the Interstate Commerce Act's "paramount purpose" of "prevention of unjust discrimination" by which certain shippers obtained financial benefits such as rebates that were denied other shippers is irrelevant to suits by competitors. Competitors do not sue to obtain financial benefits such as rebates that were discriminatorily denied to shippers. Rather, competitors sue because they were precluded from competing

for business. 12/

In this connection amici also point out that, although antitrust defendants often assert that suits by foreclosed competitors are barred because Keogh expressed concern that tariff rates relied on by plaintiffs would be hypothetical, such concern was expressly related to the fear that a hypothetical rate would be discriminatory against shippers other than the specific shipper plaintiffs who filed suit. 260 U.S. at 163-164. In other words, the concern over hypothetical rates specifically and in terms related to Congress' "paramount purpose" of preventing

12/ In the iron ore cases, neither the self unloaders, nor the private docks, nor the truckers were shippers. (The steel mills were the shippers.) Since they were not shippers, the self unloaders, docks and truckers did not pay the railroads. Accordingly, the entire concept of receiving financial benefits such as rebates of prior payments to the railroads is irrelevant in their cases.

discriminatory practices such as rebates that gave some shippers financial benefits denied other shippers, and is irrelevant to suits by foreclosed competitors, who do not sue to obtain financial benefits such as rebates that were discriminatorily denied to shippers, but who instead sue because they were precluded from competing for business.

Also, there are additional reasons why Keogh's concern over hypothetical tariff rates cannot preclude antitrust damage actions by foreclosed competitors. As shown by Judge Friendly's opinion below, even when suit is brought by a shipper, in today's world there is no longer a foundation for Keogh's concern that a hypothetical rate might be discriminatory. Furthermore, and of great importance, today it is common practice in antitrust litigation to determine the charges, prices and profits

that would have prevailed in the absence of anticompetitive actions. Finally, the lost profits of a foreclosed competitor often depend quite heavily on costs and expenses wholly aside from tariff rates. Indeed, in the iron ore cases, the foreclosed private docks, truckers and self unloaders would not even have paid tariff charges to railroads, since the docks, truckers and vessels were not shippers. 13/

B. The Application of Keogh to Bar Suits By Competitors is Contrary to this Court's Jurisprudence Regarding Implied Immunities and Would Impermissibly Extend Immunity Beyond The Congressional Grant

13/ In addition to reasons discussed above, the Keogh opinion sets forth certain other reasons for its holding. Those reasons have been severely and accurately criticized in the decision below, in papers filed by petitioners, and in papers filed by the United States. Amici join in those criticisms but shall confine their discussion to the holding and major reasons for Keogh, since these show its inapplicability to suits by competitors.

This Court has repeatedly held that implied immunities from the antitrust laws are not favored, and will be found only when there is clear repugnancy between a regulatory scheme and application of the antitrust laws. Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 682 (1975); Otter Tail Power Co. v. United States, supra, 410 U.S. at 372; United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1973). In the absence of a clear and irreconcilable conflict, the Court has been unwilling to extend antitrust immunities beyond the boundaries demarcated by Congress in regulatory statutes. Ibid.

Application of Keogh to bar suits by competitors would run directly contrary to this jurisprudence. It would provide de facto immunity from antitrust damage suits alleging foreclosure of competition, even though such immunity is not provided or

necessitated by regulatory statutes themselves. It is thus little wonder that bottleneck monopolists seek to use Keogh to preclude suit by foreclosed competitors in precisely the subject matter areas where arguments for express or implied regulatory immunity have failed. 14/ Keogh is thus asserted to try to extend immunity beyond the Congressional grant. Such extension is impermissible under this Court's cases.

C. The Use of Keogh to Bar Suits by Competitors Is Inconsistent with Requirements of the National Economy and with Sound Antitrust Policy

The use of Keogh to preclude suits by foreclosed competitors would enable bottleneck monopolists to thwart competition, technological innovation and cheaper prices in basic industries, without having to fear

14/ See cases cited in notes 7 and 8, supra.

that they will one day be called to account in antitrust damages. This is clear from the fact that Keogh has been asserted as a bar to competitors' suits in fundamental industries such as the telephone, electric power and railroad industries.

As discussed above, in these industries, companies with monopolistic power at one or more levels of the business have used that power to prevent competition and innovation at other levels. Such stifling use of monopolistic power sometimes went on for years on end or for decades, as in the telephone and railroad businesses. The bottleneck monopolists then asserted Keogh as a bar to suit by foreclosed competitors.

If attempts to impose such a bar were effective, one of the most powerful deterrents to anticompetitive conduct would be eliminated: antitrust treble damages would be unavailable. The unavailability of

treble damages would greatly encourage the kinds of competition-destroying, technology-retarding actions that have been at issue in cases involving the telephone, electric power and railroad industries. To encourage such conduct is obviously inconsistent with the needs of the national economy, which requires technological innovation and improvements that result in lower prices. It is also inconsistent with sound antitrust policy, since the antitrust laws are intended to promote innovation and lower prices, Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958); and since unlawfully foreclosed competitors have traditionally had a remedy of treble damages under the antitrust laws.

Finally, the undesirability of allowing Keogh to shield anticompetitive conduct is heightened by additional factors. One is that in some cases the

conduct sought to be immunized by Keogh has been undertaken with maximum possible secrecy. Also, Keogh is invoked on a very expansive basis: it is urged not just where bottleneck monopolists filed rates, but where they refused to do so, and to try to bar damages on the ground that victims' lost profits would have depended on the level of new tariff rates that monopolists might have filed. The use of Keogh to protect anticompetitive conduct undertaken in secrecy, and efforts to apply Keogh with great expansiveness, heighten its inconsistency with national economic welfare and antitrust policy. For such use and efforts increase its capacity to immunize and thereby encourage activity that retards technological innovation and lower prices.

CONCLUSION

Amici believe Keogh should be totally overruled. But if the Court were to hold

that Keogh retains any validity in suits brought by shippers, it should simultaneously make clear that, for reasons given above, Keogh is in no way a bar to antitrust damage actions brought by foreclosed competitors.

Respectfully submitted,

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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AND THE REGULAR COMMON CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION OF THE NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND THE REGULAR COMMON CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 36.3 of this Court the National Motor Freight Traffic Association, Inc. and the Regular Common Carrier Conference jointly move for leave to file the attached brief as *amici curiae* in support of respondents.

The National Motor Freight Traffic Association, Inc. (NMFTA) is an association of some 3,000 motor common carriers subject to economic regulation by the Interstate Commerce Commission pursuant to 49 U.S.C. § 10101, *et seq.* NMFTA represents the interest of its member carriers in proceedings before Congress, the Courts and administrative agencies.[1] The most significant function performed by NMFTA is to serve as the agency through which its member carriers collectively discharge their duty under the Interstate Commerce Act to establish, maintain and publish in tariffs just and reasonable classifications of property, which they do under an agreement approved by the ICC under 49 U.S.C. § 10706(b).

The Regular Common Carrier Conference (RCCC) is an affiliated conference of the American Trucking Associations, Inc., the national trade association of the trucking industry. Its membership consists of some 500 motor common carriers of property which operate in interstate and foreign commerce throughout the contiguous United States and, for the most part, over regular routes. RCCC was originated and functions to foster, protect, and promote the interest of the regular-route motor common carrier industry. RCCC regularly appears in proceedings before the Interstate Commerce Commission and the courts which, like this one, involve issues of general importance to the transportation industry. Member carriers of RCCC participate in the collective process necessary to formulate the National Motor Freight Classification and are parties to that tariff as well as to the tariffs

[1]In *National Motor Freight Traffic Association* v. *U.S.*, 372 U.S. 246, 247 (1963) this Court, holding that NMFTA had standing to challenge ICC orders that affected its members, noted that it performed "significant functions in the administration of the Interstate Commerce Act. . . ."

collectively established by the ten major motor common carrier rate bureaus, including respondent Niagara Frontier Tariff Bureau, Inc.

As set forth in detail in the brief, *Amici* and their members have an immediate and direct interest in the outcome of this case. Briefly, if this Court overrules its decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), NMFTA and member carriers of NMFTA and RCCC will be placed in jeopardy of treble damage suits based on the fact that the ICC found classifications to have been collectively established unlawfully and ordered them cancelled.

Wherefore, the National Motor Freight Traffic Association, Inc. and the Regular Common Carrier Conferece move that the attached *amici curiae* brief be accepted for filing.

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
CONSEQUENCES OF OVERRULING KEOGH	3
NO NEED TO OVERRULE KEOGH	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Filed Rate Doctrine Bars Recovery of Antitrust Damages	9
II. Shippers Have Adequate Remedies Under the Interstate Commerce Act	16
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 6, 9, 16, 21

Board of Trade v. United States, 314 U.S. 534 (1942) 21

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 7, 14, 15

Changes In Rates, Including Rates Based On Released Valuations, MAC, I & S Docket No. M-30367, aff'd. in *Middle Atlantic Conference v. U.S.*, No. 84-2195 (USCA 4th Cir.) (not reported) 18

Collective Ratemaking Procedures—Niagara Frontier Tariff Bureau, Inc., Case No. 71192, pending as *Niagara Frontier Tariff Bureau, Inc. v. U.S.*, *in* No. 84-1548 (USCA DC Cir.) 18

Collectively Set Accessorial Rates and Charges On Household Goods, HGCB, I & S Docket M-30371 18

Collectively Set Delivery Charges At Eastern Kentucky, C&SMFTA, I & S Docket No. M-30374 18

Compania De Gas, Etc. v. Entex, Inc., 686 F.2d 322 (5th Cir. 1982) 15

Compania De Gas, Etc. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C. Cir. 1979) 15

Ford Motor Co. v. Standard Transportation Co., et al., 308 I.C.C. 304 (1959) 14

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) 11

ICC v. American Trucking Associations, Inc. ___ U.S. ___, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984) ..... *passim*

Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation, 335 I.C.C. 403 (1969) 17

International Commodity Rates and Terminal Charges, NFTB, October 1985, I & S Docket No. M-30375 18

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922) ..... *passim*

Table of Authorities Continued

Page

Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94 10

Mohasco Industries, Inc. v. Acme Fast Fright, Inc., 491 F.2d 1082 (5th Cir. 1974), cert. denied, 419 U.S. 842 (1974) 8, 17

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) ..... *passim*

National Classification Committee v. U.S., 737 F.2d 1206 (D.C. Cir. 1984) 3

National Classification Committee v. U.S., 765 F.2d 164 (D.C. Cir. 1985) 4

Pickup and Delivery At Private Residences, C&SMFTA, October 1985, I & S Docket No. M-30376 18

Reclassification of Pork Skins and Bacon Rinds, NMFC, August 1982, No. M-30360 (1983) (not reported) 3, 4

T.I.M.E., Inc. v. U.S., 359 U.S. 464 (1959) ..... *passim*

Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 6, 10

Trailer Marine Transport Corp. v. Federal Maritime Commission, 602 F.2d 379 (D.C. Cir. 1979) 16

U.S. v. Associated Transport, 505 F.2d 366 (D.C. Cir. 1974) 17

STATUTES:

15 U.S.C. § 15 11

INTERSTATE COMMERCE ACT:

Former § 204a, Former 49 U.S.C. § 304a 16, 17, 20

49 U.S.C. § 10701 2

49 U.S.C. § 10702 2

49 U.S.C. § 10706(b) 2, 3, 19

49 U.S.C. § 11705(b) 20

49 U.S.C. § 11705(b)(3) 16

49 U.S.C. § 11705(c)(1) 16

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BRIEF OF NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND REGULAR COMMON CARRIER CONFERENCE, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* in support of respondents is filed by National Motor Freight Traffic Association, Inc. (NMFTA) and Regular Common Carrier Conference (RCCC).

NMFTA is an organization of approximately 3,000 motor common carriers of property. Under an agreement approved by the Interstate Commerce Commission (ICC) pursuant to Section 10706(b) of the Interstate Commerce Act, 49 U.S.C. 10706(b) [formerly Section 5a of the Act (49 U.S.C. § 5b)], NMFTA and its National Classification Committee are the agencies through which the NMFTA's members collectively discharge their duty under Sections 10701 and 10702 of the Act to establish, publish and maintain reasonable classifications of property governing transportation in interstate and foreign commerce, and reasonable rules related to that transportation. Those classifications and rules are filed with the ICC in a tariff known as the National Motor Freight Classification (NMFC).

Regular Common Carrier Conference is an organization of motor common carriers of general commodities. Its members perform true common carriage, i.e., they handle shipments of every type and serve all points and places for all shippers. Almost without exception, its members participate in the collectively established classifications in the NMFC and in the collectively established rates in the tariffs of one or more of the ten major rate bureaus operating under agreements approved by the ICC, including respondent Niagara Frontier Tariff Bureau.[1] More-

[1]The other nine are Central & Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Inc., Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, and Southern Motor Carriers Rate Conference.

over, most of their members are actively engaged in the collective classification and ratemaking process.

CONSEQUENCES OF OVERRULING *KEOGH*

If the Court overrules *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), the members of *Amici*, as well as NMFTA itself, will be exposed to catastrophic claims for antitrust damages arising from recent decisions of the ICC.

Reclassification of Pork Skins and Bacon Rinds, NMFC, August, 1982, No. M-30360 (1983) (not reported), was a formal investigation instituted by the ICC upon complaint by shippers that new classification items were unjust and unreasonable and had been established under collective ratemaking procedures that violated Section 14 of the Motor Carrier Act of 1980 (49 U.S.C. § 10706(b)). The ICC ordered the items cancelled on the ground that the collective action by which they were made was unlawful.[2] Its order was affirmed on judicial review without opinion. *National Classification Committee* v. *U.S.*, 737 F.2d 1206 (D.C. Cir. 1984).

On the basis of its decision in *Pork Skins,* the ICC issued an order requiring NMFTA to show cause why

[2]The ICC did not consider the claim that the new items were unjust and unreasonable. "The scope of the investigation is limited to rate bureau practices and the reasonableness of the underlying reclassification is not in question." *Decision on motions to compel answers to interrogatories,* served January 12, 1983 in Investigation and Suspension Docket M-30360. The same new items, subsequently established under different procedures, were again protested on the ground that they were unjust and unreasonable. The ICC declined to suspend or investigate them. *Notice* served July 12, 1985 in Suspension Case No. 71257.

some 500 changes in classification items made under the procedures condemned in *Pork Skins* had not been established by unlawful collective action. That proceeding resulted in an order requiring their cancellation, but prospectively only. That order was affirmed on judicial review. *National Classification Committee* v. *U.S.*, 765 F.2d 164 (D.C. Cir. 1985). However, the question of unlawful collective action *vel non* was a close one. As Judge Wald pointed out in her Separate Statement, "the Commission's interpretation of section 14 of the [Motor Carrier Act of 1980] in *Pork Skins* is not compelled by the plain language of the Act but requires an examination of Congress' purpose and intent in enacting section 14 as evidenced in the legislative history, which itself is neither extensive nor clearly definitive." 765 F.2d at 174.

In neither of these decisions did the ICC order the unlawfully established tariff items cancelled retroactively, which it could have done under its procedures approved by this Court in *ICC* v. *American Trucking Associations, Inc.*, ___ U.S. ___, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984). Obviously, it did not do so because it recognized that, in the circumstances of those cases, it would be grossly unfair to require carriers to refund to shippers overcharges measured by the difference between freight charges under the unlawfully established classification items and freight charges under the prior items. Nevertheless, if *Keogh* is overruled, the carriers will be exposed to antitrust damages on the basis of the ICC's decision that the tariff items had been established by unlawful collective action, notwithstanding that the ICC, exercising its discretion under its rejection procedures, determined that retroactive cancellation of the tariff items

was not warranted.[3] The scope of the exposure is tremendous. Some 500 classification items were collectively made under procedures found unlawful, and those items were applied by some 3000 carriers to calculate freight charges on thousands of shipments.

NO NEED TO OVERRULE *KEOGH*

Amici submit that the overruling of *Keogh* and the creation of a treble damage remedy under the antitrust laws is not necessary either to deter carriers from taking collective rate action in violation of those laws or to protect shippers against such action. Retroactive rejection of tariffs by the ICC, approved in *ATA*, does both. As the Government itself said in its brief in *ATA*, "[r]ejection is an immediate, narrowly focused, and effective remedy for rate bureau violations because it denies the carriers any benefit from collusive rates improperly arrived at." (Pet. Br. in No. 82-1643, p. 23). Again, in its reply brief the Government said: "The Commission's rejection rule is the logical means of implementing the principle that carriers are not entitled to collect rates that defy the antitrust laws because they reflect serious rate bureau violations." (Pet. Reply Br. in No. 82-1643, p. 9). This Court accepted the Government's proposition when it said:

> Indeed, the effect of the Commission's proposed new remedy is to convert the ICC into the federal government's most potent enforcer of the antitrust laws, albeit for the lim-

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[3]It is, of course, hornbook law that it is no defense to a suit in tort for damages that the action complained of was taken in good faith in the mistaken belief that it was lawful.

> ited purpose of ensuring compliance with the guidelines of § 14 of the MCA. 81 L.Ed.2d at 294.

Moreover, the rejection remedy carries out Congressional intent:

> [T]he [statutory] [p]rocedures governing the administration of § 14 [of the Motor Carrier Act of 1980] demonstrate that Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of [Section 14]. Id. at 293.

SUMMARY OF ARGUMENT

This case is governed by the filed rate doctrine, as was *Keogh, supra.* If this Court overrules *Keogh,* it will be overruling a consistent line of filed rate cases stretching from the 1907 decision in *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, to the 1981 decision in *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, (1981) (ARKLA).

The core of the filed rate doctrine is that a regulated entity may charge only the rates filed with the regulatory authority and that the only legal right a purchaser has is the right to that rate. As *Keogh* held, "[u]nless and until suspended or set aside, this rate is made, *for all purposes,* the legal rate, as between carrier and shipper." 260 U.S. at 163. (Emphasis supplied).

Petitioners' claim of injury is based on their claim that the filed rates they paid were excessive, and that but for the allegedly unlawful collective action of the carriers, hypothetical lower rates would have been filed. They seek damages based on the difference between those hypothetical lower rates and the filed rates they paid. Thus, they are asking a court to do what this Court held a court cannot do, namely, "authorize commerce . . . on other [than filed rate] terms." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951).

In *T.I.M.E., Inc.* v. *U.S.,* 359 U.S. 464 (1959), this Court, applying *Montana-Dakota,* held that the statutory provision declaring unlawful and prohibiting unreasonable motor carrier rates "does not create a cause of action for the recovery of allegedly unreasonable past rates," and that no justiciable common law right survived the passage of the Motor Carrier Act.

Petitioners' reliance on *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966) is misplaced. That case was not a filed rate case because the rates, while required to be filed with the Federal Maritime Commission, were not subject to pervasive regulation. Hence, the filed rates did not fix the legal rights of shippers as against carriers "for all purposes", as do the rates of carriers regulated by the ICC. Moreover, the issue in *Carnation* was whether the Shipping Act "precludes the application of the antitrust laws to the shipping industry." 383 U.S. at 215. Respondents here make no such claim. Their narrow claim is that a shipper has no cause of action for damages based upon allegations that rates filed with the ICC were unlawfully established. *Carnation* shed no light on this issue.

In 1965 Congress, in response to the holding in *T.I.M.E.* that shippers had no remedy for the exaction of unlawful rates by motor carriers, created a cause of action for the recovery of reparations, which were

defined as "damages resulting from charges for transportation services to the extent that the ICC, upon complaint, finds them to have been [unlawful under the regulatory standards of the Interstate Commerce Act.]" This remedy is therefore necessarily the "exclusive remedy for excessive charges." *Mohasco Industries Inc.* v. *Acme Fast Freight*, Inc., 491 F.2d 1082, 1084 (5th Cir. 1974), cert. denied, 419 U.S. 842 (1974).

True enough, recovery in a suit for reparations for excessive rates requires a finding by the ICC that the filed rates were above the zone of reasonableness. However, this does not leave shippers without adequate remedies against carriers for establishing rates within the zone of reasonableness by unlawful collective action. First, the ICC has authority, acting *sua sponte* or upon complaint, to suspend and investigate filed rates not yet effective on the ground that they may have been established by unlawful collective action. The Commission freely exercises this authority. Second, in *ATA* this Court approved procedures of the ICC under which it may *sua sponte*, and will upon complaint, enter into an investigation whether filed and effective rates were established by unlawful collective action. If it finds a substantial violation of rate bureau procedures it will order the rates cancelled retroactively, thus requiring the carriers, in the words of this Court in *ATA*, to "disgorge" all of the amounts collected under the unlawfully established rates.

The retroactive rejection remedy is superior to an antitrust remedy because the latter would require a referral to the ICC of the question whether hypothetical rates that the carriers might have filed from time to time over a period of years would have been

just, reasonable and non-discriminatory. Such a referral would present serious problems. The first is that as *Keogh*, *Montana-Dakota* and *T.I.M.E.* held, there can be no referral of issues to an administrative agency that Congress has not given it independent jurisdiction to decide. Second, determinations of rate reasonableness require the consideration of numerous factors whose importance and relationship to each other are constantly changing. Hence, such determinations, if they are not to be largely speculative, must be made in the light of contemporaneous conditions. To ask the Commission to determine whether various hypothetical levels of rates that might have been established over many years would be to ask it to engage in pure speculation.

ARGUMENT

I. The Filed Rate Doctrine Bars Recovery of Antitrust Damages

This Court recently explained the filed rate doctrine in *ARKLA*, *supra*, 453 U.S. at 577-578, as follows:

> . . . the rates that a regulated gas company files with the Commission for sale and transportation of natural gas are lawful only if they are "just and reasonable." No court may substitute its own judgment on reasonableness for the judgment of the Commission. The authority to decide whether the rates are reasonable is vested by § 4 of the Act solely in the Commission . . . and "the right to a reasonable rate is the right to the rate which the Commission files or fixes." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251, 95 L.Ed. 912,

71 S.Ct. 692 (1951). . . . These straight-forward principles underlie the "filed rate doctrine," which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. See, e.g., *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 473, 3 L.Ed.2d 952, 79 S.Ct. 904 (1959). The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, see, e.g., *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516, 520-521, 83 L.Ed. 953, 59 S.Ct. 612 (1939); *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U.S. 184, 196-197, 57 L.Ed. 1446, 33 S.Ct. 893 (1913), and has been extended across the spectrum of regulated utilities.

The filed rate doctrine has been governing law since the 1907 decision in *Texas & P.R. Co.,* v. *Abilene Cotton Oil Co., supra.* This Court there held that the Interstate Commerce Act extinguished any common law right to a reasonable rail rate and substituted therefor a right to whatever rate was duly filed with the ICC, together with a right to reparations under the procedures of the Act in the event the ICC determined the rate to be unreasonable or discriminatory.

In its 1915 decision in *Louisville & Nashville R.R. Co.* v. *Maxwell,* 237 U.S. 94, this Court said:

> Deviation from [the file rate] * * * is not permitted upon any pretext. Shippers * * * are charged with notice of it, and they as well as the carrier must abide by it * * *. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress. . . . 237 U.S. at 97.

The *Keogh* and *Georgia*[4] decisions are two in the long line of filed rate cases stretching from *Abilene* through *ARKLA*. Applying the filed rate doctrine in *Keogh,* the Court held that a shipper's claim that, but for the carriers' conspiracy in violation of the antitrust laws, he would have paid a rate lower than the filed rate failed to state a cause of action because he was not "injured in his business or property." (15 U.S.C. § 15).

> [I]njury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, *for all purposes,* the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or *tort* of the carrier. 260 U.S. at 163. (Emphasis supplied).[5]

As this Court later put it in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.:* One "can claim no rate as a legal right that is other than the

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[4]Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945).

[5]A suit for damages under the antitrust laws of course sounds in tort.

filed rate, . . . and not even a court can authorize commerce in the commodity on other terms." Yet, that is precisely what petitioners here are asking the courts to do. They claim that the filed rates were excessive and that, but for the allegedly unlawful conduct of the carriers, hypothetical lower rates would have been filed. They seek damages based on the difference between those hypothetical lower rates and the filed rates they paid. Thus, they are asking the courts to "authorize commerce . . . on other [than the filed rate] terms."

Montana-Dakota was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern, at rates filed with the Federal Power Commission under the Federal Power Act. The gravamen of the complaint was that the rates violated the Act in that they were unreasonably high, that Northwestern had misled the FPC into accepting the rates by failing to comply with its obligations of disclosure under the Act, that the rates had therefore been improperly established, and that, through interlocking directorates, Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect.[6] This Court, applying the filed rate doctrine, held that the complaint failed to state a cause of action.

Dealing with the argument of the dissent that the issue of rate reasonableness could be referred to the FPC, the Court pointed out that referral of particular

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[6]Petitioners' somewhat analogous claim here is that "[t]he ICC regulatory plan contemplates shipper participation in an open rate-setting process" but that "[t]his opportunity is denied when the carriers formulate rates secretly." (Pet. Br. 12-13, n. 6).

issues to an administrative agency might be appropriate where the plaintiff "concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary." 341 U.S. at 253. However, under the filed rate doctrine a plaintiff has no cause of action for damages grounded on a claim that he has a right to a rate other than the filed rate. Hence, Montana's claim that, but for the fraud alleged, it would have paid a lower rate failed to state a cause of action.

As the Court said:

> Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. 341 U.S. at 253-254.

So too, as *Keogh* held, injury is an "essential element" of remediable action in an antitrust damage case. Accordingly, *Montana-Dakota* stands squarely for the proposition that petitioners were not injured by the alleged misconduct of respondents unless they paid rates that were unreasonable under the substantive rate regulatory standards of the Interstate Commerce Act.

In *T.I.M.E., Inc.* v. *United States, supra,* motor carriers sued the United States, *qua* shipper, to collect freight charges the United States had refused to pay on the ground that the rates upon which they were computed were unjust and unreasonable. This Court stated the single question before it as follows: "Can a shipper of goods by a certificated motor car-

rier challenge in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" Id. at 465.

Relying on *Montana-Dakota,* the Court answered no. It held that the statutory duty of carriers to establish and observe reasonable rates, charges and classifications "creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right' ". (Quoting *Montana-Dakota*). As for the statutory provision declaring unlawful and prohibiting unreasonable rates, it "does not create a cause of action for the recovery of allegedly unreasonable past rates." The Court then went on to hold that shippers have no "justiciable legal right" to any rate other than the filed rate. 359 U.S. at 469-470.[7]

Carnation v. *Pacific Westbound Conference, supra* is not a departure from the filed rate doctrine. The doctrine had no application there because it applies only if rates are both required to be filed with a regulatory agency *and* subject to pervasive regulation

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[7]The ICC described the holding in *T.I.M.E.* as follows:

> The Court held that the Motor Carrier Act itself does not give shippers a cause of action for recovery of allegedly unreasonable rates on past shipments, nor enable them to assert unreasonableness as a defense in carrier suits to recover applicable charges, and that any such common law right which may have existed did not survive the passage of the Motor Carrier Act. The same reasoning would apply to claims for reparation on past motor-carrier shipments by reason of alleged unjust discrimination or undue prejudice and preference. *Ford Motor Co.* v. *Standard Transportation Co., et al.,* 308 I.C.C. 304, 306 (1959).

by the agency.[8] As pointed out in the opinion below, (Pet. App. 28a-35a) at the time of *Carnation* the regulation of the rates of ocean carriers in foreign commerce was minimal. The FMC had no power to suspend rates, or to determine whether rates were unreasonably high or low, or to award reparations for unreasonable rates. Hence, under the regulatory scheme administered by the Federal Maritime Commission, the rates of ocean carriers did not establish the legal rights of shippers as against carriers "for all purposes", as do the rates of motor common carriers regulated by the ICC.

Moreover, the respondents in *Carnation* contended "that the Shipping Act, 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry." 383 U.S. 213, 216, and the Court granted certiorari "in order to determine whether the Shipping Act of 1916 . . . precludes the application of the antitrust laws to the shipping industry." 383 U.S. at 215. In contrast, respondents here make no such claim. Their contention is very narrow, namely that a shipper has no cause of action for damages based upon allegations that rates filed with the ICC would have been lower but for allegedly unlawful collective action. *Carnation* sheds no light on this issue and is

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[8]A violation by Entex, an exporter of natural gas, of the requirement that it file rate contracts and supplements thereto with FERC does not prevent unfiled supplemental rate contracts from taking effect because FERC has no regulatory authority over rates of exporters. *Compania De Gas Etc.* v. *Federal Energy Regulatory Commission,* 606 F.2d 1024 (D.C. Cir. 1979). The filed rate doctrine is inapplicable in such circumstances. *Compania De Gas Etc.* v. *Entex, Inc.,* 686 F.2d 322, 328, fn. 6 (5th Cir. 1982).

clearly not precedent overruling *Keogh* or supporting the proposition that it should be overruled.

II. Shippers Have Adequate Remedies Under the Interstate Commerce Act

The holdings in *Montana-Dakota* and *T.I.M.E.* left purchasers of gas in the one case and purchasers of motor common carriage in the other without any remedy whatever for the recovery of monies paid on the basis of unlawful rates because neither the Natural Gas Act nor the Motor Carrier Act made any provision for reparations. Purchasers of natural gas are still without any remedy. See *ARKLA, supra,* at page 578 ("[T]he Commission itself has no power to alter a rate retroactively" or to award reparations).

However, in 1965 the Congress amended then Section 204a of the Interstate Commerce Act to create a cause of action against motor carriers for the recovery of reparations. "For recovery of reparations, actions at law shall be begun against common carriers by motor vehicle . . . within two years from the time the cause of action accrues. . . . § 204a(2). The cause of action in respect of a shipment of property shall . . . be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after." § 204a(4). Reparations are defined as "damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in Section 216(e) of this Part, . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." § 204a(5).[9]

[9]Former Section 204a has been recodified and appears in present 49 U.S.C. § 11705(b)(3) and (c)(1). The recodified language is not a model of clarity, but it may not be construed as making any substantive change in the prior law. This prohibition requires examination of the prior language to determine the intent of Congress. *Trailer Marine Transport Corp.* v. *Federal Maritime Commission,* 602 F.2d 379, at 383, n. 18 (D.C. Cir. 1979).

Congress thereby gave the ICC limited authority over the past rates of motor common carriers, i.e., ancillary authority to determine lawfulness or unlawfulness in aid of the new jurisdiction given to the courts to entertain suits for reparations. As the ICC explained in *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation,* 335 I.C.C. 403 (1969), § 204a gave it no authority to entertain, formally or informally, shippers' claims for reparations, and that its *only* authority with respect to past rates was ancillary authority to determine, *after* a suit for reparations was brought, whether or not those rates were lawful under the substantive regulatory standards of the Interstate Commerce Act.

There was no remedy for the exaction of unreasonable rates by a motor carrier until the Congress created one in 1965. "It necessarily follows that [that remedy] provide[s] the sole and exclusive remedy for excessive charges." *Mohasco Industries, Inc.* v. *Acme Fast Freight, supra* at 1084. To the same effect is *U.S.* v. *Associated Transport,* 505 F.2d 366 (D.C. Cir. 1974).[10] As the court there said:

[10]In both *Mohasco* and *Associated Transport* shippers brought suit for restitution of monies paid to carriers on the basis of collectively made classifications that the ICC had permitted to take effect while under formal investigation and had subsequently ordered cancelled on the ground that NMFTA had not carried its burden of proof to show that they were just and reasonable. Both cases held that a suit for restitution would not lie.

> The frame and preamendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the past. By the 1965 amendment, Congress has relented somewhat, but only to the extent of admitting the current reparations procedure. (Footnote omitted) 505 F.2d at 369.

Concededly, the recovery of reparations requires findings by the ICC that the filed rates are unlawful under the regulatory standards of the Interstate Commerce Act. Therefore, petitioners could not prevail in a suit for reparations unless the ICC were to find that respondents' rates were above the zone of reasonableness. But this does not mean that shippers claiming that reasonable rates were established in violation of rate bureau agreements are without remedies.

First, the Commission has authority *sua sponte,* or upon complaint, to suspend for seven months pending investigation rates that appear to be unlawful, including rates alleged to have been established by unlawful collective action in violation of Section 14 of the Motor Carrier Act of 1980 or of the Commission's regulations thereunder or of rate bureau agreements. The Commission has not hesitated to exercise this authority, and to order the cancellation of rates it finds to have been unlawfully established.[11]

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[11]See ICC Case No. 71192, *Collective Ratemaking Procedures—Niagara Frontier Tariff Bureau, Inc.,* rates ordered cancelled, pending on judicial review in No. 84-1548 as *Niagara Frontier Tariff Bureau, Inc.* v. *U.S.* (USCA DC Cir.); I & S Docket No. M-30367, *Changes In Rates, Including Rates Based On Released Valuations, MAC,* rates ordered cancelled, affirmed on judicial review in No. 84-2195, *Middle Atlantic Conference* v. *U.S.* (USCA 4th Cir.) (not reported); I & S Docket No. M-30371, *Collectively Set Accessorial Rates and Charges On Household Goods, HGCB,* pending; I & S Docket No. M-30374, *Collectively Set Delivery Charges At Eastern Kentucky, C&SMFTA,* pending; I & S Docket No. M-30375, *International Commodity Rates and Terminal Charges, NFTB, October 1985,* pending; and I & S Docket No. M-30376, *Pickup and Delivery At Private Residences, C&SMFTA, October 1985,* pending.

Second, the Commission has established procedures under which it may, *sua sponte,* or will, upon complaint, enter into an investigation to determine whether filed and effective rates were collectively established in violation of Section 14 of the Motor Carrier Act of 1980, 49 U.S.C. § 10706(b), or the Commission's regulations thereunder or the terms of collective ratemaking agreements. In the event it finds a substantial violation it will order the cancellation of the rates retroactively. In *ATA* this Court held those procedures to be within the authority of the Commission to adopt. The Court described the remedy as follows:

> In effect, the Commission has informed all motor carriers submitting proposed tariff increases that the Commission will approve those increases subject to the condition that the carriers may be called upon to disgorge the increases if the Commission later discovers that the tariffs were submitted in substantial violation of a rate-bureau agreement. 81 L.Ed.2d at 292.

Recovery of the increases is by way of the recovery of overcharges measured by the difference between the unlawfully established rates and the prior rates.[12] As the Court said: "For a motor carrier, overcharge liability may be ruinous." 81 L.Ed.2d at 294. Hence, this remedy indeed gives the carriers strong incentives to abide the law and their collective ratemaking agreements.

The retroactive rejection remedy is superior to an antitrust damage remedy. Proof of antitrust damages would require proof that, but for the alleged conspiracy, lower hypothetical rates would have been filed with the ICC, and then referral to the ICC of the question whether the hypothetical rates would have been just, unreasonable and nondiscriminatory. Such a referral would present serious problems.

In the first place, as *Keogh* held, although the "powers conferred upon the [ICC] are broad, . . . by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been [unlawful] be submitted to the Commission." And *T.I.M.E.*, quoting *Montana-Dakota*, held there can be no referral of issues "which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide." 359 U.S. at 475. As we have seen, the only

[12]Former Section 204a(6) of the Interstate Commerce Act defines overcharges "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission." As recodified at 49 U.S.C. 11705(b) overcharges are defined as "amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title."

rate jurisdiction the ICC has respecting past rates is the ancillary jurisdiction to determine the lawfulness of *filed* rates after a suit for reparations has been brought. The Congress gave it no authority to determine whether *unfiled hypothetical* rates would have been lawful.

In the second place, determinations of the reasonableness of rates *vel non* must be made upon the consideration of numerous factors whose importance and relationships to each other are constantly changing. As this Court said in *Board of Trade* v. *United States*, 314 U.S. 534, 546 (1942): "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." Hence, determinations of reasonableness, if they are not to be largely speculative, must be made in the light of relatively contemporaneous conditions. This is evidenced by the fact that the Congress provided a statute of limitations of only two years for reparations. To ask the ICC to determine whether various hypothetical levels of rates that respondents might have established over a period of many years would have been reasonable would be to ask it to engage in pure speculation, Cf. *ARKLA*, in which both the majority and the dissent agreed that speculation by the Federal Energy Regulatory Commission in 1980 as to what rates would have been found reasonable in 1961, in which FERC declined to engage, would have been inappropriate.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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No. 85-21 (14)

MOTION FILED JAN 3 1986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, et al.,

Petitioners,

—v.—

NIAGARA FRONTIER TARIFF BUREAU, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN INFORMATION TECHNOLOGIES CORP., BELL ATLANTIC CORP., BELLSOUTH CORP., NYNEX CORP., PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORP., US WEST INC. and their Telephone Operating Subsidiaries AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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* Nevada Bell, Bell Telephone Co. of Pennsylvania, Chesapeake & Potomac Telephone Cos., Diamond State Telephone Co., Illinois Bell Telephone Co., Indiana Bell Telephone Co., Inc., Michigan Bell Telephone Co., Mountain States Telephone & Telegraph Co., New England Telephone & Telegraph Co., New York Telephone Co., Northwestern Bell Telephone Co., Ohio Bell Telephone Co., Pacific Northwest Bell Telephone Co., Pacific Bell, South Central Bell Telephone Co., Southern Bell Telephone & Telegraph Co., Southwestern Bell Telephone Co., Wisconsin Bell, Inc.

Amici move the Court for leave to file an amicus brief in support of respondents. The proposed brief is included in this document. Counsel for petitioners have refused to consent to the filing of the brief.

Amici are the seven regional holding companies, formed in January 1984 as a result of the Bell System divestiture, and their telephone operating company subsidiaries. The principal business of these subsidiaries is to supply telephone and other telecommunications services throughout the country.

The business of providing telecommunications services is heavily regulated both at the federal level by the Federal Communications Commission ("FCC") and at the state level by state public utilities commissions. Most telephone facilities are used for both local and long distance intrastate calls and for long distance interstate communications, and, for the most part, intrastate services are regulated by state commissions and interstate ones by the FCC. Common carriers such as *amici** are required by the Federal Communications Act to file tariffs for all interstate common carrier communications services with the FCC, and the FCC has broad authority to investigate them, on its own motion or because of a third-party complaint, and to disallow provisions that are not "just, fair, reasonable and nondiscriminatory." While these tariffs are in effect, *amici* may not deviate from their terms in providing service to their customers. 47 U.S.C. § 201 *et seq.* *See American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

Pursuant to this regulatory scheme, *amici* have filed tariffs with the FCC that, for example, govern the access charges that

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* While the term "*amici*" is sometimes used to describe the regional holding companies and their telephone operating company subsidiaries collectively, the subsidiaries themselves, and not the regional holding companies, actually provide tariffed common carrier telecommunications services.

apply when long distance carriers require the use of their facilities for interstate calls. Other tariffs filed with the FCC cover dedicated or private line access and other services. Similar regulatory procedures govern the filing of tariffs with state public utilities commissions pursuant to statutes in the various states in which *amici* provide intrastate services.

On its face this case only involves the shipping business. The parties are shippers, motor carriers and a motor carrier rate bureau. The damages sought are for rates charged under tariffs filed with the Interstate Commerce Commission ("ICC"). The leading case that petitioners seek to overrule, *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), involved a claim by shippers against eight railroads for alleged overcharges in ICC-filed tariffs. Nevertheless, as this case was approached by the Second Circuit and as it has been argued by petitioners in this Court, the resolution of the case by this Court could have an enormous impact on firms outside the shipping industry, including telephone common carriers, such as *amici*.

Just like respondents, *amici* must file tariffs covering most of their services with the FCC and state regulatory bodies. *Amici* are then restricted in supplying services to the precise terms and conditions set forth in effective tariffs, and, in particular, the only rates they may charge are those in the tariffs. The FCC has broad authority to suspend, modify or disallow tariffs filed by *amici*, and in making decisions to approve or disallow tariffs, the FCC is governed by a broad public interest standard and must take into account a variety of factors in addition to free market considerations that underlie the antitrust laws. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974). In addition, the users of *amici*'s services may petition the FCC to disapprove tariffs filed by *amici*, and they have done so on a number of occasions. *See, e.g., In re MTS and WATS Market Structure*, CC Docket No. 78-72, 67

F.C.C. 2d 1429 (1978); *In re Private Line Rate Structure and Volume Discount Practices*, CC Docket No. 79-246, 97 F.C.C. 2d 923 (1984).

Although the *Keogh* case and many of its progeny involved shippers and carriers of goods regulated by the ICC, its principles have been applied to similar treble damage claims brought by users of public utilities regulated by other federal regulatory bodies. *See, e.g.*, opinion below and cases cited therein, 760 F.2d at 1356. Accordingly, the continuing viability of *Keogh* is an extremely important issue to firms such as *amici*, because, if this Court were to overrule *Keogh*, depending on the grounds for overruling it, that act could have a dramatic impact on the telecommunications business by:

— Creating a whole new class of legal claims, i.e. treble damage claims by users of telecommunications services for alleged overcharges contained in effective tariffs that had not even been challenged in the FCC;

— Distorting the regulatory process, by creating an enormous incentive for users of regulated services to bypass the FCC with their complaints, by making it more likely that courts would make rulings on matters within the primary responsibility of the FCC and by creating a risk that enormous potential treble damage exposure may hamper the efforts of *amici* to comply with the policies of the FCC; and

— Subjecting telecommunications common carriers to unquantifiable additional monetary liability for providing service under tariffs not overturned by the FCC.

For these reasons, *amici* believe that they can assist the Court in its review of the legal issues involved in this case by

explaining the broader consequences that the decision in this case may have.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
Table of Contents	vi
Table of Authorities	vii
Question Presented	xiii
Interest of *Amici*	1
Statement	1
Summary of Argument	5
Argument	7
I. *KEOGH* DOES NOT CONFER ANTITRUST IMMUNITY BUT ONLY BARS A USER OF A REGULATED UTILITY'S SERVICES FROM PURSUING TREBLE DAMAGE CLAIMS UNDER CERTAIN CIRCUMSTANCES.	7
II. *KEOGH*'S DETERMINATION THAT USERS OF REGULATED SERVICES HAVE LIMITED ANTITRUST REMEDIES HAS NOT BEEN OVERRULED BY THE COURTS OR BY CONGRESS.	10
III. JUDICIAL EXTENSION OF THE TREBLE DAMAGE REMEDY TO PLAINTIFFS IN *KEOGH*-TYPE SITUATIONS WOULD HAVE A NEGATIVE IMPACT ON THE REGULATORY PROCESS AND ON REGULATED FIRMS.	15
IV. IF *KEOGH* IS TO BE OVERRULED, CONGRESS SHOULD DO IT.	21
Conclusion	23

TABLE OF AUTHORITIES

Cases:	PAGE
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	12
Asbury Graphite, Inc. v. Dehyco Co., 1980-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980)	12
Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982)	14, 16
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	12, 13
City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981)	3, 12
City of Newark v. Delmarva Power & Light Co., 467 F.Supp. 763 (D. Del. 1979)	3
Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D. C. Cir. 1982), *cert. denied sub nom., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 461 U.S. 938 (1985)	17, 18, 19
Essential Communications Sys. Inc. v. American Tel. & Tel. Co., 610 F.2d 1114 (3d Cir. 1979)	3, 4
FCC v. RCA Communications, Inc., 346 U.S. 86 (1953)	16, 17
FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)	16
Frontier Enterprises, Inc. v. Amador Stage Lines, Inc., 1985-2 Trade Cas. (CCH) ¶ 66,827 (E.D. Cal. 1985)	3
Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945)	*passim*
Gordon v. New York Stock Exchange, 422 U.S. 659 (1975)	10
Gulf States Util. Co. v. Federal Power Comm'n, 411 U.S. 747 (1973)	16

PAGE

Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974) 17

ICC v. American Trucking Ass'ns, 104 S. Ct. 2458 (1984) ..... *passim*

Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922) ... *passim*

MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) 19

McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980) 10

McLeran v. El Paso Natural Gas Co., 357 F. Supp. 329 (S.D. Tex. 1972) 3

Minsky v. Auto Driveway Co., 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984) 12

National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied* 105 S. Ct. 1224, 1225 (1985) 17, 19

Nordlicht v. New York Telephone Co., 617 F. Supp. 220 (S.D.N.Y. 1985) 12

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 9

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 10

Phonotele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983) 5

Private Line Rate Structure and Volume Discount Practices, In re, 97 F.C.C.2d 923 (1984) 17

Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721 (1985) 4

Square D Co. v. Niagra Frontier Tariff Bureau Inc., 760 F.2d 1347 (2d Cir. 1985), *modifying* 596 F. Supp. 153 (W.D.N.Y. 1984) ..... *passim*

PAGE

United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983) 17

United States v. NASD, 422 U.S. 694 (1975) 9

United States v. Niagra Frontier Tariff Bureau, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984) . 2

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 9

United States v. RCA, 358 U.S. 334 (1954) 10, 17

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) 9

Uranium Antitrust Litigation, In re, 617 F.2d 1248 (7th Cir. 1980) 23

Wheat Rail Freight Rate Litigation, In re, 759 F.2d 1305 (7th Cir. 1985) 12

Statutes:

Clayton Act:
- 15 U.S.C. § 15(a) 7
- 15 U.S.C. § 21(a) 18

Export Trading Company Act, 15 U.S.C. § 4001 *et. seq.* 22

Federal Communications Act:
- 47 U.S.C. § 151 16
- 47 U.S.C. § 152(b) 4
- 47 U.S.C. § 201 4
- 47 U.S.C. § 202 4
- 47 U.S.C. § 203 ..... 4, 19
- 47 U.S.C. § 204 ..... 4, 5
- 47 U.S.C. § 205 ..... 4, 5
- 47 U.S.C. § 206 5
- 47 C.F.R. § 61.1 *et seq* 4
- 47 C.F.R. § 69 18

PAGE

Interstate Commerce Act:
49 U.S.C. § 10101 ..... 2, 14
49 U.S.C. § 10701(e) 2
49 U.S.C. § 10704 ..... 2, 14
49 U.S.C. § 10706 14
49 U.S.C. § 10761 14
49 U.S.C. § 11701 14
49 U.S.C. § 11705 14

Local Government Immunity Act, 15 U.S.C. §§ 34-36 22

Motor Carrier Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898 (1980) 6, 14, 15

Productivity and Innovation Act, 15 U.S.C. §§ 4301-4305 22

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Sherman Act, 15 U.S.C. § 7, *repealed by* ch. 283, § 3, 69 Stat. 283 (1955) 7

Shipping Act of 1916, 46 U.S.C. § 814 (1958) 12, 13

Miscellaneous:

P. Areeda & D. Turner, Antitrust Law, ¶ 331b (1978) .. 20

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QUESTION PRESENTED

Should the Court create a new class of lawsuits—treble damage actions by customers of federally regulated public utilities who complain about the rates they are charged under effective tariffs?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY, et al.,

Petitioners,

—v.—

NIAGARA FRONTIER TARIFF BUREAU, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN INFORMATION TECHNOLOGIES CORP., BELL ATLANTIC CORP., BELLSOUTH CORP., NYNEX CORP., PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORP., US WEST INC. and their Telephone Operating Subsidiaries AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The interest of *amici* has been set forth in the foregoing motion for leave to file this brief.

STATEMENT

Respondents are five Canadian trucking companies that ship goods between Ontario, Canada, and the eastern United States and their rate bureau, Niagara Frontier Tariff Bureau

("NFTB"). From as early as 1966 through 1981, the two petitioners claimed to have shipped goods between the U.S. and Canada on respondents' trucks at collectively established rates embodied in tariffs filed with the ICC by NFTB. NFTB is authorized by the ICC to engage in joint ratemaking under ICC supervision and in accordance with an ICC-approved ratemaking agreement. Pet. Cmplt. 8-9.

In 1983 the United States brought a civil antitrust action against respondents alleging that they had established tariff rates through procedures that violated their ratemaking agreement and that they had resorted to pressure and intimidation to prevent trucking companies from filing individual rates. The government action terminated in a consent decree that enjoined the conduct claimed to be illegal. *United States v. Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984).

Petitioners' complaints, which tracked the allegations of the government, sought treble damages on behalf of themselves and the thousands of others who shipped goods between the U.S. and Canada on the trucks of respondents and the other NFTB member carriers. Although damages were not specified, the complaint estimated that during the damage period NFTB carriers, including respondents and their co-conspirators, had international traffic revenues of $2.8 billion. The sole basis for damages alleged was that rates charged under tariffs were "at artificial and non-competitive levels". Pet. Cmplt. 11.

The tariffs in question were filed with the ICC, were fully effective under the Interstate Commerce Act and were used as the basis for charging all shippers. The ICC has full authority to disallow those tariffs prospectively or retroactively, *see ICC v. American Trucking Ass'ns*, 104 S.Ct. 2458 (1984), under a broad public interest standard contained in the governing statutes, which includes, but is not limited to, competitive considerations. *See, e.g.*, 49 U.S.C. §§ 10101, 10701(e), 10704(b). Petitioners have not asked the ICC to disallow the challenged tariffs, nor has the ICC done so on its own.

While the District Court dismissed the action in its entirety, 596 F. Supp. 153 (W.D.N.Y. 1984), the Second Circuit modified that result. 760 F.2d 1347 (2d Cir. 1985). The Court of Appeals remanded the case to the District Court to consider petitioners' antitrust injunctive claim against the alleged anticompetitive conduct and also to study whether petitioners could state an antitrust damage claim "for damages other than damages arising from the filed tariffs". 760 F.2d at 1366. The court ruled, however, that petitioners' damage claims based on effective tariffs were barred by the Court's decision in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Even though Judge Friendly opined "that much of the reasoning of *Keogh* seems outdated", *id.* at 1349, he also noted that *Keogh* "has frequently been cited by the Supreme Court with apparent approval", *id.* at 1356, and that all circuits have treated *Keogh* as controlling "with respect to rates for transportation or other services that have been filed with an appropriate federal agency as required by law" except in circumstances not relevant to this case, such as claims by competitors. *Id.*[1]

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1 The *Keogh* case itself involved a damage claim by a user of regulated services and not by a competitor of the regulated utility. This Court has not ruled on whether *Keogh* should be applied to claims by competitors. The amicus brief filed on behalf of C.D. Ambrosia Trucking Company and others urges the Court to consider this issue, because those companies are embroiled in litigation that raises it.

The considerations central to deciding whether users of utility services may sue to recover damages on account of effective tariffs may be somewhat different than those raised by claims of competitors. Indeed, some courts have concluded that such differences are sufficient to permit competitors to press damage claims when users could not. *See, e.g., Frontier Enterprises, Inc. v. Amador Stage Lines, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,827 (E.D. Cal. 1985); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Essential Communications Sys. Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1121-24 (3rd Cir. 1979). *But see City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 770-71 (D. Del. 1979); *McLeran v. El Paso Natural Gas Co.*, 357 F. Supp. 329 (S.D. Tex. 1972). On the other hand, in terms of possible distortion of the regulatory process, competitors' suits for damages based solely on effective tariffs raise many of the same concerns as suits by users. (See *infra*, pp. 15-21). Neither the record in this case, which involved a

Amici also provide services under tariffs that must be filed with an appropriate federal agency (the FCC) as required by law.[2] The FCC has authority to suspend, modify or disallow such tariffs, and may be influenced to take such action by complaints from users of *amici*'s services or *amici*'s competitors. As with the ICC, in deciding whether to disapprove tariffs, the FCC is governed by considerations going well beyond the free market goals of the antitrust laws. Yet, while such tariffs are in effect, *amici* may only offer the services covered on a non-discriminatory basis in accordance with their terms. *See* 47 U.S.C. § 201 *et seq*.[3]

The FCC is charged with supervision of *amici*'s activities with respect to interstate telecommunications and interstate access services. Any charges, classifications, practices, services and transmission facilities relevant to these activities are subject to tariff filing requirements. 47 U.S.C. §§ 152(b), 203; *see* 47 C.F.R. § 61.1 *et seq*. All such tariffs must be reasonable and non-discriminatory. 47 U.S.C. §§ 201, 202. No change in existing rates may go into effect without 90 days notice unless the FCC expressly provides for a shorter period. 47 U.S.C. § 203.

The FCC has the authority to suspend and investigate rates, on its own initiative and upon complaint. 47 U.S.C. §§ 204, 205. Moreover, the FCC must give such complaints preference

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judgment on the pleadings, nor the briefs of the parties supply sufficient background information to test this issue. The complexity of the cases that the C.D. Ambrosia Trucking Company *amici* are involved in, as spelled out in their amicus brief, indicates that the issue is a difficult one that may be ripe at some later date.

2 Indeed, the Federal Communications Act was modeled after the Interstate Commerce Act. *Essential Communications Sys. Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3d Cir. 1979).

3 *Amici*'s intrastate services are regulated by state public utilities commissions, and typically are subject to the same kind of tariff mechanism as the FCC scheme. To the extent that these activities raise antitrust immunity or similar issues, they are governed by the so-called state action doctrine and not by *Keogh*. *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S.Ct. 1721 (1985).

over all other matters pending before it. 47 U.S.C. § 204(b). Any carrier which seeks to increase its rates bears the burden of proof in showing that the increase serves the public interest. 47 U.S.C. § 204.

The FCC's evaluation of a rate includes, but is not limited to, competitive issues. The agency must also consider safety, efficiency, allocation of rate burden, financial integrity of carriers and any other factor relevant to the public interest. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983). Should the FCC disallow a rate, it has the duty and sole authority to establish a rate which would serve the public good. 47 U.S.C. § 205. Finally, a user may obtain a refund of any unjustified charge paid or actual damages, plus reasonable attorneys fees, through a proceeding in court or before the FCC. 47 U.S.C. §§ 204(a), 206.

Summary of Argument

In *Keogh* and in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), the Court did not grant immunity to the carriers. To the contrary, it expressly ruled that railroads were not immune from the antitrust laws and that anticompetitive misconduct would subject them to criminal or civil government proceedings and to private injuntive actions. The Court further ruled, however, that customers of common carriers could not sue for antitrust treble damages on account of effective tariffs or to enjoin the use of such tariffs. Such relief could be obtained only under the regulatory scheme. The limitation on available remedies was based on the Court's understanding of what accommodation between the two statutes was necessary to effectuate the Congressional intent.

The *Keogh* rule has been uniformly followed by the federal courts for over six decades. During those years, Congress has specifically focused on *Keogh* and *Georgia* in formulating legislation on regulatory immunity but has not evidenced the slightest intention of overruling or limiting the *Keogh* doctrine.

In particular, Congressional action in passing the Reed-Bulwinkle Act and the Motor Carrier Act of 1980 more likely evidence acquiescence in, or ratification of, *Keogh* than an intent to overrule it. Even if the Court were to hold that one or both of these statutes overruled *Keogh* by implication as to the trucking industry, however, they would not provide a basis for overruling *Keogh* as to other federally regulated carriers.

Creating a treble damage action for users of federally regulated services would have a substantial negative impact on the regulatory process itself and on federally regulated firms. The lure of treble damages would create a strong incentive for customers with complaints about common carrier tariffs to bypass the regulatory agency, to let time pass so that damages would accrue and then to go to court. If the magnitude of such cases was large, there would be a substantial risk that courts would decide the legality of such tariffs differently than the regulators or that this would create a cumbersome situation in which many primary jurisdiction referrals would be necessary. In addition, a threat of very large dollar exposure would influence regulated companies to take the safest possible competitive approach in formulating their tariff filings, regardless of their customers' needs and despite the stated policy of the regulatory agency.

If *Keogh* is to be overruled, Congress should do it. No real case has been made for creating this new treble damage cause of action. Congress has been fully aware of this well-settled rule for decades, and has passed immunity legislation against the *Keogh* backdrop. Moreover, such a ruling would be inconsistent with the current trend in Congress to restrict the treble damage remedy. In fact, Congress is currently studying a bill which would further limit the treble damage remedy in cases such as the present one, where claims are made against foreign corporations based on international transactions.

ARGUMENT

I.

KEOGH DOES NOT CONFER ANTITRUST IMMUNITY BUT ONLY BARS A USER OF A REGULATED UTILITY'S SERVICES FROM PURSUING TREBLE DAMAGE CLAIMS UNDER CERTAIN CIRCUMSTANCES.

Keogh and its progeny crafted a narrow, finely drawn exception to the antitrust laws' general applicability to business firms. In *Keogh*, a shipper complained to the ICC of allegedly anticompetitive freight rates filed by railroad carriers and sought to have the rates disallowed. The ICC suspended the rates pending investigation, held hearings to determine whether the rates were reasonable and nondiscriminatory, and subsequently approved the rates. The shipper then brought its claims to federal court, seeking treble damages and insisting that the rates were anticompetitive in violation of the Sherman Act. 260 U.S. at 159-60.

The Court recognized that the United States could challenge anticompetitive conduct by the carriers in an injunctive action under the Sherman Act, thus making it clear that the defendants were not immune from the antitrust laws. *Id.* at 161-62. But an antitrust damage claim by shippers was another matter. Justice Brandeis examined Congress' intent under the Interstate Commerce Act and the Sherman Act[4] and determined that shippers had no cause of action to sue for antitrust treble damages on account of rates in tariffs lawfully in effect under the Interstate Commerce Act. The Court made it clear that shippers simply had not suffered "injury" under the antitrust laws for rates in tariffs not disallowed by the ICC. *Id.* at 162-63.

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4 Keogh sued under § 7 of the Sherman Act, which provided for a private treble damage remedy to one "injured in his business or property" by a violation of the antitrust laws. Section 7 of the Sherman Act has since been repealed, ch. 283, § 3, 69 Stat. 283 (1955), but § 4(a) of the Clayton Act contains essentially the same provision. 15 U.S.C. § 15(a).

Justice Brandeis spelled out several grounds for the Court's holding. Central to his reasoning were conclusions that Congress had not intended that the additional treble damage remedy be permitted in these circumstances; that permitting such a remedy would necessarily result in a court speculating as to what the ICC would have decided under the Interstate Commerce Act; and that there was no effective way for an antitrust court to refer Interstate Commerce Act questions to the ICC so as to avoid conflicts on such factual issues. *Id.* at 160-64. Justice Brandeis explained that it could be impossible for a court to decide what lower rate could have been charged as a legal, non-discriminatory rate in the absence of an unlawful conspiracy, because such a lower rate might not legally be maintained "without reconstituting the whole rate structure for many articles moving in an important section of the country." *Id.* at 164.

Although this Court in *Keogh* disallowed a treble damage claim based on effective tariffs, the Court expressly noted that other remedies were available to combat anticompetitive conduct by carriers. Making it clear that anticompetitive conduct by the railroads was not protected by antitrust immunity, the Court observed that:

> "under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6."

260 U.S. at 161-62.

Twenty-three years later, in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), while expressly reaffirming the holding in *Keogh*, the Court ruled that private parties could also maintain injunctive actions under the antitrust laws to enjoin "the alleged rate-fixing combination and conspiracy among the defendant carriers." *Id.* at 455-56. The only limitation on such an injunctive action was that a court could not suspend or

terminate the operation of an effective tariff itself; only the regulatory agency could so act. *Id.* at 454-55.

Against this background, it is difficult to understand why petitioners' brief talks so much about immunity. The rate-making conduct of the trucking companies was not immunized from antitrust scrutiny by the *Keogh* decision. In *Keogh*, the Court recognized that even specific ICC approval of the tariffs in question would not bar the government from instituting enforcement proceedings against the carriers. 260 U.S. at 161-62. The singular import of the *Keogh* decision was to deny treble damage claims to shippers who allege injury resulting from a filed tariff rate. 260 U.S. at 162-63.[5]

In this case, the Court is not being asked to confer antitrust immunity upon all rate making conduct of a carrier which results in filed tariffs. The prior government case and the consent decree entered into by the United States and respondents show that, if respondents unlawfully restrain competition, they are subject to antitrust censure. This appeal presents the Court solely with the question of whether an additional remedy—a treble damage claim by users complaining about tariff charges—should be created to supplement remedies historically permitted.

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5 It was clear well before *Keogh* that railroads are subject to the antitrust laws and that general antitrust immunity would not be implied for them. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897). This was reaffirmed in *Keogh* and *Georgia*. It was for that reason that Congress has, on several occasions, enacted legislation providing for varying degrees of express immunity for the transportation industry. *See, e.g.*, Reed-Bulwinkle Act, Pub.L. No. 80-662, 62 Stat. 472 (1948). Over the years the Court has considered whether implied antitrust immunity might be proper for other industries, given the regulatory statutes that Congress had enacted for them and the specific factual circumstances of the case. Those decisions turned on a particular analysis of the industry in question and of the regulatory regime enacted by Congress. *See, e.g., United States v. NASD*, 422 U.S. 694 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). In this case, implied antitrust immunity issues are not raised as to transportation or any other industry.

II.

KEOGH'S DETERMINATION THAT THE USERS OF REGULATED SERVICES HAVE LIMITED ANTITRUST REMEDIES HAS NOT BEEN OVERRULED BY THE COURTS OR BY CONGRESS.

In *Keogh* the Court construed two federal statutes and, based on its understanding of Congressional intent, held that users of regulated services had limited antitrust remedies. Since this Court achieved that accommodation of the antitrust and regulatory schemes in *Keogh* some 63 years ago, the governing principles have not been disturbed by the courts or by Congress.[6]

Later court decisions show that *Keogh* indeed represents a narrow type of antitrust exception. The *Keogh* decision was expressly reaffirmed in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). The *Georgia* opinion emphasized that *Keogh* does not represent the grant of a wholesale antitrust immunity to carriers that file tariffs with the ICC. Instead, in *Georgia* the Court ruled that purchasers of services from regulated carriers could seek monetary remedies for filed tariff rates only before the ICC under the Interstate Commerce Act. Should the purchaser wish to seek injunctive relief, however, its remedy

6 The *Keogh* rationale has frequently been cited with approval in cases dealing with questions of "implied immunity" or "primary jurisdiction", issues not raised in this case. *See, e.g., United States v. RCA*, 358 U.S. 334 (1954) (given pervasive regulatory scheme of FCA, courts will defer to FCC's primary jurisdiction); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (where CAB has been granted authority to award injunctive relief with respect to particular questions involving antitrust considerations, courts will not intercede); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (purchasers may not seek treble damages or injunctive relief for fixed commission rates, the establishment of which is actively overseen and approved by SEC); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980) (court's jurisdiction over antitrust action need not be impaired even though available remedies are limited to injunctive relief).

lies with the federal courts for the ICC does not possess the necessary authority to enjoin conspiratorial activity.

Georgia is important because in his opinion Justice Douglas spelled out what kind of an accommodation the Court was reaching between the regulatory and the antitrust schemes. Georgia claimed that 20 railroads had conspired to fix arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from that state. What was claimed to be illegal was that the railroads had utilized a complex series of private conferences and rate bureaus and other collective efforts at regimentation that were not contemplated by the Interstate Commerce Act and were unlawful under the antitrust laws.

Under the regulatory scheme, there were certain things the ICC could not do, such as obtaining an order against anticompetitive future joint action. In such a circumstance the Court ruled that it was proper for a private party to sue under the antitrust laws to obtain such an injunction. *Id.* at 455-59. In addition, the Court quoted language from *Keogh* as to the permissibility of government civil or criminal antitrust actions. But there were two remedies the Court would not permit to Georgia. It could not sue for damages under the antitrust laws, and it could not obtain an order setting aside a tariff within the jurisdiction of the ICC. *Id.* at 453-54. This result was reached because of the Court's assessment of what Congress had sought to accomplish in enacting the two different statutory schemes even though the rates in question had not been specifically approved by the Commission after hearings. Damages or disallowance of tariffs would only be available under the regulatory scheme.

As Judge Friendly noted in the decision below, 760 F.2d at 1356, the courts have uniformly applied the principles of *Keogh* to damage claims by users of utility services concerning rates for transportation and other services that have been filed with an appropriate federal agency as required by law and

where the agency itself had not questioned their lawfulness[7]. This rule has been uniformly followed by all federal courts, so far as research to date has been able to indicate.[8] Thus through almost the entire history of the antitrust laws this broad area of potential treble damage claims has been specifically disallowed.[9]

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7 *See, e.g., Minsky v. Auto Driveway Co.*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S.Ct. 435 (1984); *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Asbury Graphite, Inc. v. Dehyco Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980).

8 So far as we can determine no court has seriously questioned the continued vitality of *Keogh*'s actual ruling and, moreover, it has been applied to bar damage claims in cases where antitrust issues are not even raised. In a recent decision, *Nordlicht v. New York Telephone Co.*, 617 F. Supp. 220 (S.D.N.Y. 1985), the court invoked *Keogh* to dismiss a user's claim for money had and received based upon filed tariffs. The court stylized the *Keogh* rule as the "filed tariff doctrine" and explained:

> "The existence of a filed tariff essentially neuters any claim plaintiff might have that the utility's adherence to the rate is improper or inequitable. The filed tariff doctrine defines such a rate as wholly proper. . . . So long as defendant provided the requisite service, it was lawfully entitled by those tariffs to charge those rates. The filed tariff doctrine thus insulates defendant from any equitable claim that its charging these rates was improper."

Id. at 227 (footnote omitted). Furthermore, the court recognized that *Keogh* did not immunize a regulated utility from all liability. *Id.* at 226 n.4. *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (holding that "filed rate doctrine" precluded recovery of damages based upon difference between contract rate and tariff rate).

9 Contrary to petitioners' argument, this Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), did not overrule *Keogh*. *Carnation* did not discuss or even mention *Keogh*. *Carnation* only held, on the basis of the particular statutory scheme governing the Federal Maritime Commission ("FMC"), that the FMC's regulatory authority was not sufficiently pervasive to invoke a *Keogh*-type rule, and, accordingly, a shipper aggrieved by collective tariff rates filed with the FMC could seek antitrust damages.

In *Carnation*, the shipper claimed that the carriers had put their rate agreement into effect in direct contravention of the governing legislation, the Shipping Act of 1916. Unlike the Interstate Commerce Act, the Shipping Act then effective made the FMC's express approval of tariff rates a mandatory prerequisite to their implementation. See 46 U.S.C. § 814 (1958). Furthermore, the regulatory scheme imposed by the Shipping Act was much less extensive than that created under the ICA, particularly in the area of rate-making. In particular, the FMC was not accorded the power to extensively regulate rate competition as was the ICC and, consequently, its authority to award reparations was limited. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1362-64 (2d Cir. 1985) (comparing Shipping Act provisions with parallel mandates of the ICA).

Petitioners attempt to sidestep all this history by arguing that this Court's opinion last year in *I.C.C. v. American Trucking Ass'ns*, 104 S. Ct. 2458 (1984), proves that *Keogh* has been "supplanted." Brief for Petrs. at 32. There the Court noted that "whenever the [ICC] finds an effective tariff unlawful, injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow." *Id.* at 2462. Although the scope of the damage remedy that exists under these circumstances was not fully delineated, it is clear that the Court did not indicate any intention to overrule *Keogh*.

Congress has done nothing to upset the Court's work. It has long known and focused upon the *Keogh* limitation on treble damage claims. Certainly, Congress has never in any way, shape or form expressed any displeasure with *Keogh*, and based on Judge Friendly's review of legislative history, *see* 760 F.2d at 1357-1360, it is not an overstatement to say that in enacting the Reed-Bulwinkle Act[10] Congress acquiesced in the *Keogh* doctrine because it did not want to destroy the balance between regulatory and antitrust enforcement embodied in *Keogh* and *Georgia*.

When Congress enacted the Reed-Bulwinkle Act in 1948, the *Georgia* case was not a peripheral player; it was center stage. *See* 760 F.2d at 1358-60. Congress was deeply concerned that the exposure of the industry to antitrust actions could have a troublesome impact on transportation policy, and its response was to grant joint conduct by carriers and rate bureaus antitrust immunity under certain conditions. As Judge Friendly noted, however, Congress was fully aware that *Keogh* also

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10 Pub. L. No. 80-662, 62 Stat. 472 (1948).

barred antitrust damage claims for overcharges in effective tariffs but gave no hint of any intention to overrule this aspect of *Keogh* or *Georgia*. As he put it, "it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect." 760 F.2d at 1359.

To the contrary, Congress enacted Reed-Bulwinkle on the clear assumption that *Keogh* and *Georgia* expressed a long-standing rule that was part of the antitrust/regulatory accommodation which it was shaping.

Similarly, the 1980 amendments to the Interstate Commerce Act,[11] while fostering a more competitive climate in the motor carrier industry, do not impair the *Keogh* rule. All carriers still must file tariffs with the ICC. 49 U.S.C. § 10761. Agreements between carriers to act collectively must also be submitted to the ICC. 49 U.S.C. § 10706(b)(2). The ICC, on its own motion or upon complaint, has sole authority to determine the lawfulness of tariffs. 49 U.S.C. § 11701; *Burlington Northern Inc. v. United States*, 459 U.S. 131 (1982). Evaluation of any tariff necessarily entails consideration of competitive effects within the "reasonable and non-discriminatory" standard. *See* 49 U.S.C. §§ 10101, 10704, 10706(b)(2), (c)(2), (f)-(h). The power to disallow a tariff rate lies exclusively with the ICC and, once a rate is disallowed, the ICC must prescribe a new rate, again utilizing the public interest yardstick. 49 U.S.C. § 10704. Finally, any shipper proving injury from an unlawful tariff rate may recover actual damages or overcharges plus attorney fees. 49 U.S.C. § 11705 (b), (d)(3); *see ICC v. American Trucking Ass'ns, supra*. Accordingly, nothing in the 1980 amendments destroys the remedy afforded the shipper in *Keogh* under the regulatory regime, nor is there any indication that Congress intended to provide the shipper with a new remedy outside the scope of the ICA.

Even if the Court were to find by implication a Congressional intent to overrule *Keogh* as to the trucking industry in

11 Pub. L. No. 96-448, 94 Stat. 1898 (1980).

the Reed-Bulwinkle Act or in the 1980 amendments to the Interstate Commerce Act, the Court should not conclude that *Keogh* was thereby overruled as to other regulated industries. There is nothing in the legislative history that would even suggest such an intent.

III.

JUDICIAL EXTENSION OF THE TREBLE DAMAGE REMEDY TO PLAINTIFFS IN *KEOGH*-TYPE SITUATIONS WOULD HAVE A NEGATIVE IMPACT ON THE REGULATORY PROCESS AND ON REGULATED FIRMS.

Petitioners place considerable reliance on Judge Friendly's conclusion that *Keogh's* theoretical underpinnings have been undermined by subsequent developments in the judicial and regulatory arenas. See 760 F.2d at 1352-54. Thus they urge the Court to decree a substantial expansion of the treble damage remedy as a matter of regulatory policy and the public interest. In doing so, however, they ignore the kind of substantive impact that such a change in the law would have.

A distillation of the factual scenario present in *Keogh* demonstrates that similar disputes are susceptible to frequent occurrence in the context of several federally regulated industries, not just the motor carrier and other ICC-regulated industries but also in areas such as telecommunications. First, a regulated firm files a tariff in substantial compliance with the regulatory procedural requirements—a tariff which reflects the carrier's perception of the regulator's public interest goals. The regulator has full authority to disallow the tariff if it does not meet the statutory "public interest" requirements and may institute a proceeding to do so on its own motion or at the suggestion of a third party. Next, the tariff becomes effective. Subsequently, a user that has not achieved the result it desired before the agency or that decided simply to ignore the regula-

tory process in its entirety goes into federal court in the hope of recovering treble damages, probably for itself and classes of other users, based upon a tariff which has never been disallowed or even questioned by the agency charged with the primary responsibility to supervise, approve and reject such tariffs.

If the Court now for the first time were to fashion such a cause of action, the lure of treble damages and attorney's fees would create a potent incentive for customers of regulated utilities to bypass the regulatory process and, instead, to seek redress in the federal courts. Entrusting the federal courts with the duty to determine whether tariffs are lawful would directly contradict this Court's oft-repeated pronouncement that the ICC is charged with the preeminent authority to supervise, approve and, if necessary, prescribe tariff rates. *See Burlington Northern, Inc. v. United States*, *supra*; *ICC v. American Trucking Ass'ns*, *supra*. Although Congress dictates the parameters within which the ICC acts, it is the ICC's duty to ensure that tariff rates reflect the national transportation policy. *See Gulf States Util. Co. v. Federal Power Comm'n*, 411 U.S. 747 (1973); *ICC v. American Trucking Ass'ns*, *supra*.

Such a change in the law would also create friction with the scheme Congress has established for telecommunications regulation. Congress has determined that national communications policy should strive "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." and has endowed the FCC with the authority to carry out this policy. 47 U.S.C. § 151. The question whether a carrier's filed tariff rate advances the public interest, as set forth above, is entrusted to the "deposit of [the FCC's] experience, the disciplined feel of the expert." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (FCC's judgment regarding how the public interest is best served is entitled to substantial

judicial deference); *United States v. RCA*, 358 U.S. 334, 348 (1959).

The FCC must wade through a labrynth of factors to make such a determination and "encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." *FCC v. RCA Communications, Inc.*, *supra* at 93; *Hawaiian Tel. Co. v. FCC*, 498 F. 2d 771, 777 (D.C. Cir. 1974). Even today, after the entry of the Modification of Final Judgment in *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 231 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983), the FCC cannot evaluate a tariff solely with an eye towards encouragement of competition but must be guided by the preservation of universal service as its overriding principle. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224, 1225 (1985). The FCC must also strive for the elimination of undue preferences among rates for interstate services, the efficient use of local networks, prevention of uneconomic bypassing of common carrier facilities and stimulation of competition. *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, *supra*; *In re Private Line Rate Structure and Volume Discount Practice*, 97 F.C.C. 2d 923 (1984).

Elements of tariff rates must reflect the carrier's cost characteristics and pricing convenience for both the carrier and customer as well as market demand. *In re Private Line Rate Structure and Volume Discount Practice*, *supra* at 934, 941. Moreover, the rapid advance of telecommunications technology further complicates FCC supervision of tariffs. *See, e.g., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 461 U.S. 938 (1985) ("*Computer II*"). In *Computer II*, the Court of Appeals entertained a challenge to an FCC ruling that "enhanced services", consisting of combined data processing and com-

munications services, were not common carrier services within the intendment of the Federal Communications Act and, therefore, were not within the ambit of the agency's regulatory authority. The Court upheld the FCC's determination, recognizing that the agency must facilitate technological advancement within the field of telecommunications in order to serve the public interest.

The issue before this Court becomes more worrisome because, as contemplated by various federal regulatory acts, tariffs that are indisputably reasonable and nondiscriminatory, and therefore in the public interest, may seem anticompetitive to some extent.[12] Although, pursuant to 15 U.S.C. § 21(a), the ICC, as well as the FCC and the FTC, is statutorily mandated to enforce the Clayton Act's prohibitions against discrimination in prices, services and facilities, and against tying arrangements and monopolistic mergers, an agency may give less emphasis to these prohibitions if the regulatory act so indicates. An antitrust court may not have such discretion. True, the court may seek to minimize the risk of such a clash by a primary reference to the agency, but this is, at best, a cumbersome and time-consuming mechanism and, at worst, an involuntary diversion of agency resources.

As this Court recently noted, the ICC also has broad discretion to fashion remedies and certainly can provide adequate relief to an injured shipper. *ICC v. American Trucking Ass'ns*, *supra*. Contrary to petitioners' protestations, the ICC is well-equipped to hear and determine their claims. Although

12 The FCC, for example, has ordered all telephone exchange carriers to set certain of their rates to long distance carriers based upon nationally averaged costs. As a result, exchange carriers must frequently impose rates either substantially below or above their own costs. Moreover, the revenues from these services must be pooled and allocated among the exchange carriers in proportion to their actual costs. These arrangements could arguably have anticompetitive effects. *See generally* 47 C.F.R. § 69 (1984). However, the FCC has concluded that they are in the public interest in spite of such possible effects.

the agency cannot review every tariff that is filed, its 1984 Annual Report indicates declining growth in the number of tariff filings. 1984 ICC Ann. Rep. 17-18. More significantly, litigation over rate matters has abated, with less than 20 shipper complaints filed during 1984. *Id.* at 17, 48. In 1984, 6,347 rate cases were settled through the ICC's informal dispute procedures, leaving only 67 pending at year end. *Id.* at 71, 109. Only .007 percent of the 1,250,000 tariffs filed were protested, and all such protests were heard. *Id.* at 70-71. Accordingly, shippers who are vigilant of their rights can seek and obtain full consideration through the ICC.

The FCC is similarly endowed with far-reaching latitude to remedy inequities. *See* 47 U.S.C. § 203 *et seq.*; *National Ass'n of Regulatory Util. Comm'rs v. FCC*, *supra*; *Computer II*, *supra*. Despite its broad discretion, however, one mandate remains clear: the FCC may not abolish the requirement that common carriers file tariffs. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The agency itself had previously noted:

> "There can be no question that tariffs are essential to the entire administrative scheme of the [Federal Communications] Act. . . . The importance of tariffs and the requirement that common carriers—*all common carriers—must offer all of their communications services to the public through published tariffs* is well established . . . *The [FCC] has no authority to ignore [this command] even if market forces are present which undercut the 'national monopoly' justification for regulation.*"

Id. at 1192-93 *quoting In re Western Telegraph Co.*, 75 F.C.C. 2d 461, 474 (1980) and Brief of FCC at 49-50, *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (emphasis added) (citations omitted). *See also ICC v. American Trucking Ass'ns*, *supra* at 2472 (O'Connor, J., dissenting) (Congress intended that transportation carriers rely on tariffs and, in fact, industry revolves around them).

Finally, new exposure to liability for treble damage awards to all of a carrier's users may well distort the carrier's decision-making process in formulating its tariffs. The initiation of tariffs by carriers is basic to the regulatory process. The specter of financial disaster from treble damages to a potentially huge plaintiff class may influence the carrier to make the safest filing from an antitrust standpoint although regulatory policy—communicated through published decisions or less formally—may indicate that such filings are not in the public interest.

The complexity of any judgment concerning the impact of a treble damage remedy upon a carrier's rate-making process warrants extensive consideration by Congress. The broad spectrum of legal commentary on the economic efficacy of treble damages in any context heightens this concern. Many commentators have challenged the remedy's deterrent value and question whether government enforcement and penalty provisions, premised upon economic evaluation of the loss to society, would yield greater economic efficiency. *See, e.g.*, K. Elzinga and W. Breit, The Antitrust Penalties: A Study in Law and Economics 112-138 (1976); Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 Utah L. Rev. 57; Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980). Others contend that the punitive effects of treble damages over-deter possibly beneficial conduct, resulting in unnecessary restriction of output, and that the trebling of damages should be discretionary with the court. P. Areeda & D. Turner, Antitrust Law, ¶ 331b (1978). *Cf.* Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 Seton Hall L. Rev. 17 (1983) (asserting that treble damages are the most potent instrument to deter anticompetitive conduct). The intricacy of this evaluation becomes even more entangled in the regulatory arena where Congress has determined that the optimal allocation of economic resources may require some restraint upon competitive forces so that a public utility can best serve the public.

It cannot be known how extreme would be the impact of overruling *Keogh*, since it has been a fixture on the legal landscape for so long. There would undoubtedly be cases brought by users and classes of users against various federally regulated utilities on account of their tariffs. The extent to which such claims would succeed and the scope of the utilities' liabilities would not be known for years. The uncertainty this would create for regulated firms cannot be estimated in advance, but it can be predicted that the cases would have a substantial impact on the operation of several federal regulatory schemes. This is because firms threatened with the enormous exposure of treble damages for their alleged anticompetitive conduct and subject to the not necessarily consistent decisions of several hundred federal judges (not to mention juries) would be affected in their decision-making, and this would influence them to be less mindful of other public interest policies the regulatory agencies may wish to advance.

In short, there is strong evidence that the *Keogh* accommodation is still viable today, although, perhaps, for slightly different reasons than those articulated by Justice Brandeis in 1922. It is also fairly clear that overruling *Keogh* would have a large substantive impact. On the other hand, the *Keogh* rule has not permitted regulated firms to avoid the rigors of the antitrust laws. In the matter at bar, for example, the consent decree in the government action has already permitted antitrust goals to be achieved without disrupting the regulatory process.

IV.

IF KEOGH IS TO BE OVERRULED, CONGRESS SHOULD DO IT.

In deciding whether to overrule one of its prior decisions, the Court must frequently balance a variety of factors. In this case, the Court is asked to create a new cause of action for treble damages—a step which would almost certainly spawn significant amounts of new litigation and have a substantive impact on the regulatory process. This it should not do.

Keogh has been well-settled law for more than a half century. Congress has been aware of it, has legislated with it in mind, and yet has never found fault with it. Moreover, *Keogh* itself has rarely been criticized by courts or commentators, probably because it is a sensible accommodation between various federal regulatory regimes and the antitrust laws. Where antitrust immunity does not apply but the regulator has broad control over tariffs, *Keogh* permits government antitrust suits of all kinds and private antitrust suits for injunctive relief. On the other hand, for monetary relief or tariff disallowance, users must look to the regulatory process. Perhaps the proof that this system has been a sensible accommodation is that petitioners point to no evidence of its failure. They assert that change is necessary but make no showing of such need.

Moreover, it would be inappropriate for the Court after all this time to create a new treble damage cause of action for users of utility services at a time when Congress has been amending the treble damage remedy to define and to narrow its reach. In the past few years, Congress has refined and cut back antitrust remedies—particular treble damage remedies—on several occasions, including the Export Trading Company Act,[13] the Productivity and Innovation Act of 1984 (dealing with joint research and development ventures),[14] and the Local Government Immunity Act of 1984.[15]

Many more suggestions for such reform have been made and some have been the subject of extensive hearings. One of the most serious of these efforts in this Congress is S. 397, 99th Cong., 1st Sess. (1985), the Foreign Trade Antitrust Improvements Act of 1985. It is particularly relevant to this case, in that it would seek to minimize the conflict between this country and its trading partners by reducing treble damage exposure in cases of foreign commerce, such as the present in which *all* the

13 Pub. L. No. 97-2920, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 4001 *et seq.* (1984).

14 Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. § 4301 *et seq.* (1984)).

15 Pub. L. No. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. § 34 *et seq.* (1984)).

defendants are foreign firms and *all* of the commerce in question is international. *See* 131 Cong. Rec. S1160 (Feb. 6, 1985) (Statement of Senator DeConcini).[16]

CONCLUSION

Keogh and its progeny are a sensible reconciliation of potentially conflicting statutory mandates. Even if the Court would be inclined to decide *Keogh* differently today, however, it would not be appropriate to overrule *Keogh* given the legislative history as to *Keogh* itself and recent Congressional activity in the antitrust remedy area.

Respectfully submitted,

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16 During the past few years cases such as *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), have led to enormous friction with our trading partners, including Canada. To some extent this friction hopefully has been alleviated by bilateral agreements such as the March 9, 1984, U.S.-Canada Antitrust Accord, 5 Trade Reg. Rptr. (CCH) ¶ 50,464, but S. 397 and other proposals are designed to further reduce the international relations problems created by such litigation.

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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, *et al.*,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Association of American Railroads (AAR) hereby moves, pursuant to Supreme Court Rule 36.3, for leave to file the accompanying brief as *amicus curiae* in support of the respondents.[1]

The AAR is the trade association for the nation's railroads. Its members operate approximately 92% of the trackage and account for approximately 97% of the freight revenues of all railroads in the United States.

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[1] Respondents have consented to the filing of this brief; petitioners have not.

The Association represents its member railroads before courts, agencies, and the Congress in matters of common concern.

Petitioners question the continuing validity of this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), in a motor carrier case to be decided under the law as it stood prior to 1980. If this Court were to overrule that case retroactively, the decision would have a substantial and unfair impact on railroads by exposing them to possible treble damage liability for joint carrier rate-making in decades prior to 1980 as well as in the recent past. Indeed, several members of the AAR are defendants in private treble damage actions in which the validity of the *Keogh* rule before 1980 is a critical issue, some of which involve rate actions going back as far as 1956.[2] Consequently, the issue presented here of the vitality of the *Keogh* doctrine in situations arising prior to the enactment of major new regulatory legislation in 1980 continues to be significant to the railroad industry.

In addition to demonstrating the continuing need for and validity of the *Keogh* doctrine prior to the 1980 amendments to the Interstate Commerce Act, the AAR attempts to outline the 1980 rail legislation as it applies to ICC regulation of rail rates. Although we believe this is not an appropriate case in which to determine the effects on the *Keogh* doctrine of either the Motor Carrier

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[2] *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co.* v. *Baltimore & Ohio RR.*, 54 U.S.L.W. 3085 (U.S., July 16, 1985) (No. 85-112); *Litton Industries, Inc.* v. *Penn Central Corp.*, No. C 81-372 (N.D. Ohio, Oct. 5, 1984) and *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 600 F. Supp. 859 (N.D. Ohio 1983), *on reconsideration*, 600 F. Supp. 866 (N.D. Ohio 1984), *appeals docketed*, Nos. 84-3654 & 84-3876 (6th Cir., Aug. 10, 1984, and Oct. 29, 1984); *In re Lower Lake Erie Iron Ore Litigation*, MDL 587, Memorandum and Pretrial Order No. 4 (E.D. Pa. June 5, 1985).

Act of 1980 or the Staggers Rail Act of 1980, those enactments are discussed in the briefs for petitioners and for the *amici* supporting petitioners, including the United States, and the legislation treats motor carriers (represented by respondents) differently from railroads.

In the accompanying brief, the AAR addresses the issues presented by the case from the railroad industry's perspective. The AAR believes that it would be useful to the Court to have the railroad industry's views on these matters, particularly since *Keogh* dealt specifically with the regulation of railroads long before motor carriers became subject to the Interstate Commerce Act.

Accordingly, we respectfully request that the Court grant the AAR leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
THE INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. The *Keogh* Doctrine Was an Appropriate Judicial Accommodation Between Two Sharply Conflicting Statutory Regimes	3
A. The Antitrust Laws and the Interstate Commerce Act Embodied Opposing Approaches to the Regulation of Rates and Prices	3
B. The *Keogh* Doctrine Represented a Judicial Accommodation Tailored to the Direct Conflict Between Treble Damage Remedies and the ICC's Rate Authority Under the Interstate Commerce Act	6
1. Treble Damage Actions Directly Conflicted with the Regulatory Regime	8
2. The *Keogh* Decision Represented a Sound Response to the Conflict Posed by Treble Damage Actions	8
3. The *Georgia* Decision Expressly Reaffirmed the Accommodation Reached in *Keogh*	10
II. The Congress Accepted the *Keogh* Doctrine When It Enacted the Reed-Bulwinkle Act	11
III. There Have Been No Judicial Developments That Would Justify Overruling the Long-Established *Keogh* Doctrine	18
IV. The Government's Policy Objections to the *Keogh* Doctrine Are Unsound	21

TABLE OF CONTENTS—Continued

	Page
V. Recent Rail Legislation Offers No Basis for Arguing That *Keogh* Has Been Repudiated, Although Some Rail Traffic Is No Longer Regulated So As To Be Protected by *Keogh*	25
VI. If *Keogh* Is To Be Overruled, This Court Should Make That Ruling Prospective Only	29
CONCLUSION	30
STATUTORY APPENDIX: Selected Provisions of the Interstate Commerce Act, as amended and supplemented through January 18, 1976, as published in 49 U.S. Code (1970 ed. & Supp. V 1975):	
National Transportation Policy	1a
§ 1	2a
§ 2	11a
§ 3	12a
§ 4	14a
§ 5	16a
§ 5b	18a
§ 6	22a
§ 7	26a
§ 8	27a
§ 9	27a
§ 10	28a
§ 13	30a
§ 15	31a
§ 15a	40a
§ 16	41a
§ 41	46a

TABLE OF AUTHORITIES

Cases:	Page
American Commercial Lines, Inc. v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571 (1968)	4
American Express Co. v. *Caldwell*, 244 U.S. 617 (1917)	21
Anadarko Cotton Oil Co. v. *Atchison, Topeka & Santa Fe Ry.*, 20 I.C.C. 43 (1910)	6
Arizona Grocery Co. v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932)	20
Arrow Transportation Co. v. *Southern Railway*, 372 U.S. 658 (1963)	6
Baer Brothers v. *Denver & Rio Grande R.R.*, 233 U.S. 479 (1914)	6
Bell Potato Chip Co. v. *Aberdeen Truck Line*, 43 M.C.C. 337 (1944)	19
Board of Trade of Kansas City v. *United States*, 314 U.S. 534 (1942)	5
Brae Corp. v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3771 (U.S., April 29, 1985) (No. 84-550)	27
Burlington Northern Inc. v. *United States*, 459 U.S. 131 (1982)	6
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966)	7
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	29, 30
Colorado v. *United States*, 271 U.S. 153 (1926)	5
Dayton-Goose Creek Ry. v. *United States*, 263 U.S. 456 (1924)	5
Flood v. *Kuhn*, 407 U.S. 258 (1972)	21
General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940)	19, 20
Georgia v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945)	*passim*
Gordon v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)	6, 7
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	19
Hetzel v. *Baltimore & Ohio Railroad*, 169 U.S. 26 (1898)	21

TABLE OF AUTHORITIES—Continued

	Page
ICC v. *American Trucking Associations, Inc.*, 467 U.S. 354 (1984)	22, 23
In re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co.* v. *Baltimore & Ohio Railroad*, 54 U.S.L.W. 3085 (U.S., July 16, 1985) (No. 85-112)	23
Import and Domestic Rates on Vegetable Oils, 78 I.C.C. 421 (1923)	5
Iron Ore Rate Cases, 41 I.C.C. 181 (1916), *supplemental proceedings*, 44 I.C.C. 368 (1917)	4
Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922)	*passim*
Lake Coal Demurrage, 232 I.C.C. 735 (1939)	4
Miller v. *Fenton*, 54 U.S.L.W. 4022 (U.S., Dec. 3, 1985) (No. 84-5786)	21
Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970)	21
Motor Vehicles, Kansas City, Mo., to Southwest, 332 I.C.C. 615 (1968)	5
Mt. Hood Stages, Inc. v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978)	18
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)	29
Northwestern Pac. R. Co. Abandonment, 320 I.C.C. 19 (1963)	5
Pan American World Airways v. *United States*, 371 U.S. 296 (1963)	18
Reduced Handling Charges on Iron Ore at Marquette, Michigan, Docks, 315 I.C.C. 347 (1961)	4
Southern Motor Carriers Rate Conf. v. *United States*, 53 U.S.L.W. 4422 (U.S., March 27, 1985) (No. 82-1922)	7, 21
Southern Pacific v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918)	19
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985)	*passim*
Straus v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924)	21

TABLE OF AUTHORITIES—Continued

	Page
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)	19
Supreme Tribe of Ben-Hur v. *Cauble*, 255 U.S. 356 (1921)	21
Terminal Warehouse v. *Penn. R. Co.*, 297 U.S. 500 (1936)	9
Texas & Pacific Railway v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)	6
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 (1959)	6
Transit on Wheat Between Reshipping Point and Destination, 365 I.C.C. 890 (1982)	23
Trunk-Line and Ex-Lake Iron Ore Rates, 69 I.C.C. 589 (1922)	4
United States v. *Borden Co.*, 308 U.S. 188 (1939)	19, 20
United States v. *Chicago, M., St.P. & Pac. R.R.*, 294 U.S. 499 (1935)	20
United States v. *Illinois Cent. R. Co.*, 263 U.S. 515 (1924)	20
United States v. *Joint Traffic Association*, 171 U.S. 505 (1898)	7
United States v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975)	6, 7
United States v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897)	7
Statutes and Rules:	
Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (1978)	3
Elkins Act, ch. 708, § 1, 32 Stat. 847 (1903), as amended, 49 U.S.C. § 41 (1970)	4, 8
Federal Rules of Civil Procedure, Rule 23	19, 24
Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, as amended:	
§ 1, 49 U.S.C. § 1 (1970 & Supp. V 1975)	3, 4
§ 2, 49 U.S.C. § 2 (1970)	4
§ 3, 49 U.S.C. § 3 (1970)	4
§ 5, 49 U.S.C. § 5 (1970)	18

TABLE OF AUTHORITIES—Continued

	Page
§ 5a, 49 U.S.C. § 5b (1970)	12
§ 6, 49 U.S.C. § 6 (1970)	4, 8
§ 8, 49 U.S.C. § 8 (1970)	5, 9
§ 9, 49 U.S.C. § 9 (1970)	5, 9
§ 13, 49 U.S.C. § 13 (1970)	5
§ 15, 49 U.S.C. § 15 (1970)	5
§ 16, 49 U.S.C. § 16 (1970)	5, 9
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	22, 23, 25, 26
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)	26
Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948)	*passim*
Sherman Act, ch. 647, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1982), and supplemented by §§ 4-4C & 16 of the Clayton Act, ch. 323, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15-15c & 26 (1982)	*passim*
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980)	*passim*
Subtitle IV, Interstate Commerce, of Title 49, U.S. Code, Transportation:	
49 U.S.C. § 10505 (1982)	27
49 U.S.C. § 10701a (1982)	28
49 U.S.C. § 10704 (1982)	28
49 U.S.C. § 10706 (1982)	23, 27
49 U.S.C. § 10707 (1982)	28
49 U.S.C. § 10709 (1982)	28
49 U.S.C. § 10713 (1982)	27
49 U.S.C. § 10741 (1982)	28
49 U.S.C. § 10761 (1982)	28
49 U.S.C. § 10762 (1982)	28
49 U.S.C. § 11701 (1982)	28
49 U.S.C. § 11705 (1982)	28
49 U.S.C. § 11706 (1982)	25
Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920)	18

TABLE OF AUTHORITIES—Continued

	Page
Transportation Act of 1940, ch. 722, 54 Stat. 898 (1940)	3, 18
Regulations:	
49 C.F.R. § 1039.10 (1984)	27
49 C.F.R. § 1039.11 (1984)	27
49 C.F.R. § 1039.13 (1984)	27
49 C.F.R. § 1039.14 (1984)	27
49 C.F.R. § 1312.41 (1984)	27
Legislative Materials:	
Hearings on H.R. 2536 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1945)	12, 16
Hearings on H.R. 2536 Before the Senate Committee on Interstate Commerce, 79th Cong., 2d Sess. (1946)	*passim*
Hearings on S. 110 Before the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. (1947)	12, 15, 16
Hearings on H.R. 221 and S. 110 Before the House Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. (1947)	12, 15, 16
H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947)	*passim*
H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. (1980)	26
H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. (1980)	26
S. Rep. No. 44, 80th Cong., 1st Sess. (1947)	*passim*
S. Rep. No. 94-499, 94th Cong., 1st Sess. (1975)	5
S. Rep. No. 96-470, 96th Cong., 1st Sess. (1979)	26
Miscellaneous:	
3B I. L. Sharfman, *The Interstate Commerce Commission* (1936)	5
D. P. Locklin, *Economics of Transportation* (7th ed. 1972)	5

THE INTEREST OF AMICUS

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

Petitioners and the United States seek to have this Court overrule the doctrine of *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), under which plaintiffs may not recover treble damages based on claims that published rates filed with and regulated by the Interstate Commerce Commission (ICC) would have been lower but for a violation of the antitrust laws.

A. The *Keogh* doctrine represents a carefully considered and appropriate reconciliation of the opposing policies of the Interstate Commerce Act (ICA) and the antitrust laws. By requiring persons seeking monetary damages resulting from rates filed with and regulated by the ICC to complain to that agency rather than to federal antitrust courts, *Keogh* ensured that the detailed regulatory and remedial provisions of the ICA would not be subverted.

B. Petitioners' principal argument is that Congress "supplanted" the *Keogh* doctrine by the Reed-Bulwinkle Act. Not only did Congress fail to overrule *Keogh* in that Act, as the United States concedes, but the legislative history demonstrates that Congress intended to accept and supplement—rather than nullify—the *Keogh* doctrine.

C. The Government's principal argument is that *Keogh* has been so eroded by subsequent developments in the law that overruling is necessary. But the judicial developments upon which the Government relies reflect doctrines that had already matured by 1945 when *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), expressly reaffirmed *Keogh* and, indeed, largely antedate *Keogh* itself. Under the circumstances, principles of *stare decisis* weigh heavily against overturning this sixty-year old reconciliation of significant federal statutes.

D. The *Keogh* doctrine remains a sound accommodation of antitrust and transportation policy wherever the ICC has continued power to regulate filed rates. The Government's arguments to the contrary do not adequately reflect the policies and provisions of the ICA. In particular, the flexible remedial authority of the ICC, an expert administrative agency familiar with all the interests involved, would be replaced by the rigid treble-damages remedy of the antitrust laws in litigation to be decided by courts and juries.

E. The Government also argues that recent amendments to the ICA, including the Staggers Rail Act of 1980, represent a Congressional repudiation of *Keogh*. Although the Staggers Act was a comprehensive revision of the regulatory provisions governing rail carriers, that Act did not expressly or impliedly overrule *Keogh*. Instead it established several different regulatory regimes applicable in different circumstances. While the obligation to adhere to published rates no longer applies to some rail traffic, it continues to apply to other traffic. Moreover, while the scope of ICC regulation has been loosened in varying degrees as to some traffic, that regulation continues virtually unabated as to other traffic. Thus, in many cases, the regulatory underpinnings of *Keogh* remain in full force. In any event, the Staggers Act is not involved in this case, and the impact of the new regulatory regime upon the *Keogh* doctrine should be decided in cases where such issues are directly involved and fully briefed. The Act provides no basis for reshaping pre-1980 law on the basis of the changes made in 1980.

F. Should all these arguments be rejected, any overruling of *Keogh* should be prospective only. Under the circumstances, however, there is no justification for overruling a doctrine that has been an essential component of the regime of rail rate regulation for over sixty years.

ARGUMENT

I. The *Keogh* Doctrine Was an Appropriate Judicial Accommodation Between Two Sharply Conflicting Statutory Regimes.

A. *The Antitrust Laws and the Interstate Commerce Act Embodied Opposing Approaches to the Regulation of Rates and Prices.*

The Sherman Act and the Interstate Commerce Act (ICA) embodied fundamentally conflicting approaches to prices and rates—conflicting as to objectives, standards and means.

The fundamental purpose of the Sherman Act is to protect competition. Its premise is that the public good is served best if goods and services are offered at prices and terms set by competition. The courts enforce the law through criminal sanctions, punitive treble damages, and civil injunctions. Rate regulation under the ICA, however, took a very different approach. The railroads, as common carriers, were obliged to provide service to all who requested it, 49 U.S.C. § 1(4),[1] and the ICA embodied a national transportation policy that sought, rather than competitively determined prices, "the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." 54 Stat. 899. Accordingly, the Act required rates that were "just and reasonable," 49 U.S.C.

[1] The initial Act to Regulate Commerce was enacted in 1887. 24 Stat. 379. As amended and supplemented, it was published in 49 U.S.C. §§ 1 *et seq.* until codified by Pub. L. 95-473, 92 Stat. 1337 (1978), as 49 U.S.C. §§ 10101 *et seq.* While that codification was not intended to make any "substantive change" in the law (see § 3(a), 92 Stat. 1466), it extensively revised the structure and language of the Act. Extensive substantive changes were made by the Staggers Rail Act of 1980. Citations in this brief to 49 U.S.C. §§ 1 *et seq.* are to the relevant provisions applicable to railroads as amended through January 18, 1976, as published in 49 U.S.C. (1970 ed. & Supp. V 1975), which generally sets forth the cited provi-

§ 1(5), without "undue or unreasonable" preferences or advantages to any person, company or place, *id.* § 3(1). Those rates had to be set forth in tariffs filed with the ICC, open to public inspection, *id.* § 6(1). Carriers could not lawfully depart from those published rates, *id.* § 6(7), and could not change them without 30 days advance notice to the ICC and to the public, *id.* § 6(3). Rebates were prohibited, *id.* § 2, and made subject to criminal penalties, *id.* § 41.

A complex structure of interdependent rates emerged from these regulatory requirements. Because rates could not discriminate between shippers, ports, or places, the rate charged for moving a particular shipper's goods between two points could not be set in isolation, but had to take into account rates applicable to competing shippers, ports, and geographic areas.[2] Because rate differences could divert traffic and threaten the economic health of competing carriers, rates had to take into account rates charged by competitors.[3] Because the ICA required adequate, reasonably priced rail service for all traffic, the ICC at times required below-cost services and what in effect were cross-subsidies among shippers, and required carriers to maintain capacity beyond that which the market would justify.[4] The application of these statutory standards required an often complicated weighing and balancing of the various considerations embodied in the national transportation policy—in particular balancing the need of shippers for economical transportation against the need of railroads for revenues sufficient to support adequate and efficient service.[5]

Congress created a single agency to administer this regime. It was recognized that courts had "neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 548 (1942). To be sure, the ICC was called on to approve or disapprove only a fraction of all filed rates, but the ICA set standards for all such rates, and anyone affected by a rate could invoke an ICC investigation.

Moreover, instead of the retrospective punitive regime of the Sherman Act, the ICA remedial scheme was largely prospective and compensatory. The ICA required advance public filing of rates so that interested parties could protest any deemed to be unreasonable or discriminatory. Upon such a protest, or on its own initiative, the ICC could investigate and suspend the rates, 49 U.S.C. §§ 13(1), 15(7), prescribe different rates that would be just and reasonable, *id.* § 15(1), and grant reparations for overcharges and other violations, *id.* §§ 8, 9, 16(1). Rates had to be challenged within two years from accrual of the cause of action "and not after," *id.* 16(3)(b), because economic conditions changed and rendered the

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sions as they read during the bulk of the period at issue here. Selected provisions are in the statutory appendix attached hereto.

[2] See, *e.g.*, *Iron Ore Rate Cases*, 41 I.C.C. 181 (1916), *supplemental proceedings*, 44 I.C.C. 368 (1917); *Trunk-Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589 (1922).

[3] Indeed, the ICC on numerous occasions expressly disapproved efforts by a carrier to charge more "competitive" rates, opting in favor of uniform rates that assured equal treatment of shippers and subsidized less economically robust carriers. See, *e.g.*, *Reduced Handling Charges on Iron Ore at Marquette, Michigan, Docks*, 315 I.C.C. 347 (1961); *Lake Coal Demurrage*, 232 I.C.C. 735, 771-774 (1939); *Trunk-Line and Ex-Lake Iron Ore Rates*, *supra*, 609-611. See also *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571 (1968).

[4] See, *e.g.*, *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 480 (1924); *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926); *Northwestern Pac. R. Co. Abandonment*, 320 I.C.C. 19, 24 (1963); S. Rep. No. 94-499 at 10-11 (1975).

[5] *E.g.*, *Motor Vehicles, Kansas City, Mo., to Southwest*, 332 I.C.C. 615, 624-26 (1968); *Import and Domestic Rates on Vegetable Oils*, 78 I.C.C. 421, 527-28 (1923). For detailed discussions of rate regulation, see 3B I.L. Sharfman, *The Interstate Commerce Commission* (1936); D. P. Locklin, *Economics of Transportation* (7th ed. 1972).

world of past rates obsolete and difficult to reconstruct. See *Baer Brothers* v. *Denver & Rio Grande R.R.*, 233 U.S. 479, 488 (1914); *Anadarko Cotton Oil Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 20 I.C.C. 43, 50 (1910). Thus, the ICA provided shippers and others with a complete remedy administered by an agency which would take into account the policies of the Act.

Recognizing the ICC's exclusive jurisdiction with respect to rate-making, this Court from 1907 through its latest decision in 1982, in a variety of contexts, has consistently refused to permit lower courts to go behind the rates filed with the ICC, whatever the justification. To do otherwise would disrupt the administrative procedures and regulatory policies of the ICA; it would threaten the Act's precepts of nondiscrimination and rate uniformity as well as the balance between shipper and carrier interests that Congress had confided to the ICC. *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959); *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658 (1963); *Burlington Northern Inc.* v. *United States*, 459 U.S. 131 (1982). Thus, *Keogh* was simply one of an unbroken line of decisions, albeit an important one, aimed at preserving the pre-eminence of the ICC in rate-making matters.

B. *The* Keogh *Doctrine Represented a Judicial Accommodation Tailored to the Direct Conflict Between Treble Damage Remedies and the ICC's Rate Authority Under the Interstate Commerce Act.*

The regulatory regime embodied in the ICA thus required carriers in setting their rates to look to legal standards very different from those under the antitrust laws. In similar situations, antitrust actions have been completely barred by this Court because they would "pose[] a substantial danger that [the defendants] would be subjected to duplicative and inconsistent standards." *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694, 735 (1975); *Gordon* v. *New York Stock Exchange*,

Inc., 422 U.S. 659, 688-89 (1975); *cf. Southern Motor Carriers Rate Conf.* v. *United States*, 53 U.S.L.W. 4422 (U.S., March 27, 1985).[6]

In contrast to those cases, the Court in *Keogh* took a more limited approach. In closely divided decisions, the Court had previously rejected wholesale immunity from the antitrust laws for collective rate-making by common carriers. *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898). As *Keogh* itself recognized, "a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6." 260 U.S. 161-62. But the Court in *Keogh* nevertheless precluded private treble damage actions—a remedy that presented a direct conflict with the rate provisions of the ICA.

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[6] *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), is not to the contrary. The Court there rejected a contention that the Shipping Act impliedly "precludes the application of the antitrust laws to the shipping industry" (383 U.S. at 215), but as Judge Friendly pointed out, the Shipping Act was "a very limited regulatory scheme" as compared to the ICA so that, among other things, "the filing of tariffs under the Shipping Act [did] not limit the rights of shipper vis-a-vis carrier" (Pet. App. 32a). Thus, *Carnation* would not be inconsistent with an implication of complete antitrust immunity for carriers regulated under the ICA, much less the more limited exclusion of an antitrust damages remedy under the *Keogh* doctrine.

We note that *United States* v. *National Ass'n of Securities Dealers, supra*, involved a statutory requirement of adherence to a published price in a manner analogous to the provisions of the ICA relied on in *Keogh*. See 422 U.S. at 699, 711. The Court pointed out that "in view of this express requirement no question exists that antitrust immunity must be afforded" sales to which that statutory requirement applied. *Id.* 699.

1. *Treble Damage Actions Directly Conflicted with the Regulatory Regime.*

To be entitled to treble damages under the antitrust laws for rates charged by an allegedly unlawful combination of carriers, the plaintiff would have to establish that, in the absence of the antitrust violation, a different—and lower—rate would have been charged. Damages would be based on the difference between that rate and the rate actually charged.

Such claims presented a direct conflict with the provisions of the ICA in three respects. First, under the ICA the carrier could lawfully charge only the tariff rate, 49 U.S.C. § 6(7); failure to charge it was a criminal offense, *id.* § 41. Second, plaintiffs had to establish not only that a lower rate would have been charged in the absence of the antitrust violation, but that such rate would have been "reasonable" and "nondiscriminatory" under the substantive standards of the ICA—a determination that only the ICC could make. Third, the ICA established an ICC-administered remedial scheme very different from the remedial scheme under the antitrust laws, which offered treble damages imposed by a jury able to look far backward in time—a remedy that could undermine the financial health of carriers, which the ICC was required to foster.

2. *The* Keogh *Decision Represented a Sound Response to the Conflict Posed by Treble Damage Actions.*

The Court considered each of these problems in *Keogh*. The Court held that, because the challenged rates were contained in published tariffs duly filed with the ICC, they could not be the basis of an award of antitrust damages. 260 U.S. at 160, 162. The Court emphasized that the lawfulness of railroad rates is to be determined under the provisions of the ICA, not the antitrust laws: "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the

Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce." *Id.* 162. Reasoning that injury implied violation of a legal right and finding that plaintiff's rights were "measured by the published tariff," the Court held that the plaintiff suffered no injury cognizable under the antitrust laws, as a result of the alleged conspiracy. *Id.* 163. The Court further justified its holding on the ground that if a plaintiff recovered antitrust damages for injuries from allegedly excessive rate levels, it would obtain a preference over its trade competitors, thus defeating the "paramount purpose" of Congress—prevention of unjust discrimination. *Id.*

A second basis for the *Keogh* decision was that a plaintiff, to recover damages, had to establish that "the hypothetical lower rate would have conformed to the requirements of the [ICA]"—no simple matter since, for example, "it is possible that no lower rate from St. Paul on tow and excelsior could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the country." 260 U.S. at 164. Such determinations must be made by the ICC, at least in the first instance, not by courts and juries. *Id.*

Finally, the Court concluded that, in view of the remedial provisions of the ICA, Congress could not have intended to provide shippers with the quite different and essentially conflicting damage remedy provided by the antitrust laws, noting that the ICC had plenary power to grant the full amount of damages sustained by a shipper because of any unlawful rate. 260 U.S. at 162, citing §§ 8, 9, and 16 of the ICA.[7]

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[7] The Court further elaborated the basis for this holding in *Terminal Warehouse* v. *Penn R. Co.*, 297 U.S. 500 (1936), as follows:

> "The Commerce Act * * * embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a [violation of the Act] but it does not stop at that point. * * * For the wrongs that it denounces

3. *The* Georgia *Decision Expressly Reaffirmed the Accommodation Reached in* Keogh.

Twenty-three years later, the accommodation reached in *Keogh* was revisited and reaffirmed in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). The Court granted the State of Georgia leave to file an antitrust complaint for damages and injunctive relief against twenty railroads, alleging a conspiracy to set, through some sixty rate bureaus, "noncompetitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other States over the ports of Georgia," 324 U.S. at 443. Georgia sued both as *parens patriae* and as a proprietor of a state-owned railroad and thus as a competitor of the defendant railroads.[8] *Id.* The rates had been filed but, unlike the rates in *Keogh*, had not been challenged before the ICC. *Id.* 453, 476. Nevertheless, in discussing whether the complaint stated a cause of action, the Court held squarely:

> "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. * * * The reasoning and precedent of that case apply with full force here." *Id.* 453.[9]

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it prescribes a fitting remedy which, we think, was meant to be exclusive." 297 U.S. at 514.

[8] The Brief of C.D. Ambrosia Trucking Co. *et al.* as *Amicus Curiae* (at 5) urges this Court, if it affirms *Keogh*, to hold that *Keogh* does not bar suits by competitors. That issue, which is involved in certain cases now in the lower courts, is not before the Court in this case and therefore is not an appropriate one to address, except to note that sustaining the contention of those *amici* would require a holding that *Georgia* was erroneously decided as to the State's claims as a proprietor. With respect to the assertions in that brief (at 11-20) about the conduct of certain railroads at issue in the Lake Erie iron ore litigation, none of these cases has come to trial and many of those assertions are contested. See accompanying Motion at 2, n.2.

[9] Chief Justice Stone and the three other dissenters fully concurred in this conclusion, as to which the Court was therefore unanimous. 324 U.S. at 468.

The Court held that, since the ICA did not give the ICC any jurisdiction over the alleged rate-fixing conspiracy insofar as it involved coercion (*id.* 455-63), the exclusive jurisdiction doctrine could not bar an injunction to put an end to such activities; such an injunction "need not enjoin operation under established rates." *Id.* 455. But since the ICC did have jurisdiction over the rates and charges themselves, that jurisdiction excluded any remedy under the antitrust laws based on the rates imposed. *Id.* 454. The Court explicitly adopted the reasoning of *Keogh*, relying heavily on the view that the tariff rate was the only "legal" rate "until suspended or set aside" by the ICC. *Id.* 453. Accordingly, the Court held that Georgia could not, in its antitrust conspiracy action, recover damages based upon the rates imposed pursuant to the alleged conspiracy, *id.*, nor could it obtain injunctive relief setting those rates aside, *id.* 454-55.

II. The Congress Accepted the *Keogh* Doctrine When It Enacted the Reed-Bulwinkle Act.

Contrary to the principal arguments advanced by petitioners (Br. 16-29), we agree with Judge Friendly that, as the Government concedes, "Congress did not overrule *Keogh* in passing the Reed-Bulwinkle Act" (U.S. Br. 16). Petitioners are nevertheless correct in focusing upon Reed-Bulwinkle and its legislative history as a leading indication of the intent of the Congress in regard to the propriety of the *Keogh* doctrine. The enactment of Reed-Bulwinkle was the occasion on which the Congress most explicitly, and exclusively, considered the relationship between the ICA and the antitrust laws. Moreover, that was done in the context of and in reaction to the *Georgia* decision as well as to certain civil injunctive and criminal actions brought by the Department of Justice.[10]

Those "developments [had] caused grave concern among all those having direct interest in transportation, who see

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[10] See H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947); S. Rep. No. 44, 80th Cong., 1st Sess. 5-6 (1947).

in the situation a threat to long-standing practices in the transportation industry that were developed in cooperation with the shippers and have proved their worth;" which "concern [was] evidenced by the views expressed during the hearings by the shipping and business interests of the country, and by governmental authorities," who "were virtually unanimous in their demand for remedial legislation." S. Rep. No. 44, *supra*, at 6; accord, H.R. Rep. No. 1100, *supra*, at 4.[11] The "remedial legislation" thus demanded and enacted was directed solely at that aspect of *Georgia* which upheld the jurisdiction of the courts to enjoin the alleged conspiracy insofar as it involved activities over which the ICC did not have jurisdiction. Reed-Bulwinkle added a new § 5a to the ICA (49 U.S.C. § 5b) which authorized the ICC to approve agreements establishing rate bureaus for the joint consideration of rates and charges, and relieved both the making and the carrying out of such agreements in accordance with their terms and conditions "from the operation of the antitrust laws." 62 Stat. 472.[12]

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[11] The Chairman of the House Interstate and Foreign Commerce Committee inserted in the Hearings on H.R. 221 and S. 110, 80th Cong., 1st Sess. (1947) ("1947 House Hearings"), at 286-301, a 15-page listing by name of "organizations supporting S. 110, as shown by the record of hearings on H.R. 2536, Seventy-ninth Congress, and S. 110, Eightieth Congress" (*id.* at 286). See also, generally, Hearings on H.R. 2536 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1945) ("1945 House Hearings"); Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce, 79th Cong., 2d Sess. (1946) ("1946 Senate Hearings"); Hearings on S. 110 Before the Senate Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess. (1947) ("1947 Senate Hearings").

[12] Among other things, the committee reports pointed out that the ICA imposes duties and responsibilities upon carriers, as with respect to joint rates and through routes, "which by their very nature can be met only through joint action on the part of the carriers"; that the need for joint action is not limited to joint rates or to the participants in such rates because the "rates which together make up a rate structure necessary to satisfy both the standards prescribed by law and the legitimate requirements of commerce are

The Reed-Bulwinkle Act did not nullify the *Keogh* doctrine, or that aspect of the *Georgia* decision applying *Keogh*, either expressly or by repeal of the statutory basis for the doctrine in the ICA:

> "The bill provides for no relief from any provision of law other than the antitrust laws. *Notwithstanding the approval of an agreement by the Commission, all provisions of the Interstate Commerce Act will apply to the carriers and to action taken by them to the same extent and in the same manner as though such agreement had not been approved.*" H.R. Rep. No. 1100, *supra*, at 5; S. Rep. No. 44, *supra*, at 8 (emphasis added).

Hence, the "bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable*," except for the antitrust immunity provided therein for agreements approved by the ICC. H.R. Rep. No. 1100, *supra*, at 5; S. Rep. No. 44, *supra*, at 7-8 (emphasis added).

If the ICA is applied "to the same extent and in the same manner as though [a rate-bureau] agreement had not been approved" under the Reed-Bulwinkle amendment, plainly that Act must be applied so as to preclude recovery of antitrust damages based upon tariff rates filed with and regulated by the ICC. The *Keogh* decision was grounded upon an interpretation and application of provisions of the ICA that continued in effect at the time of Reed-Bulwinkle and thereafter. Thus, in stating

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interrelated and interdependent"; that the "law places upon the carriers the duty to initiate rates which meet the same standards that are applied by the Commission in reaching its determinations as to their lawfulness," and the rate bureaus provide "a method by which rates, in advance of their publication, are subjected to tests as to their reasonableness and lawfulness in other respects similar to those which are commonly applied" by the ICC, including consultation with shippers as to "their wishes and needs"; and "that as a result of the application of that method the volume of rate litigation before the regulatory bodies is greatly reduced." H.R. Rep. No. 1100, *supra*, at 8-10; S. Rep. No. 44, *supra*, at 9-11.

that the antitrust laws would continue to apply to carriers "so far as they are now applicable" except insofar as made inapplicable by Reed-Bulwinkle, the congressional committees must have understood and intended that the *Keogh* doctrine would continue to apply after the enactment of Reed-Bulwinkle. This is particularly so since those committees were aware both of the *Georgia* decision reaffirming and applying the *Keogh* doctrine and of the *Keogh* decision itself.[13]

In addition to innumerable references to the *Georgia* decision during the congressional hearings, the entire *Georgia* opinion (including the dissent) was included in the record of the 1946 Senate Hearings (at 1529-48). There were also a number of references to the *Keogh* decision itself. During the 1946 Senate Hearings, for example, Clyde B. Aitchison, then a Commissioner of the ICC who had "been instructed by the Commission to present its views on the pending bill" (*id.* at 1131), testified, among other things, that:

> "Thus, in *Keogh* v. *Chicago & N.W. Ry. Co.* (260 U.S. 156)—which involved a regulated common carrier—the Court passed on the liability under section 7 of the Sherman Act of a railroad to a shipper for rates charged according to tariffs which were in conformity with the Commerce Act. The Court remitted the shipper to the Interstate Commerce Commission for any damages he might have suffered from illegal (unreasonable or discriminatory) rates, despite there might have been an antecedent illegal combination

[13] In that regard, the Senate Committee noted generally "that in the field of transportation important objectives of the antitrust laws are achieved by means of Government regulation. For example, the antitrust laws are designed to protect the public from unreasonable and excessive prices or unduly limiting production. But resort to such laws is not necessary for that purpose in the case of common carriers because the objective of reasonable prices is achieved by other means, that is, by clothing governmental authorities with power to fix reasonable rates and charges." S. Rep. No. 44, *supra*, at 4.

> of carriers, for which the Government might have criminal redress under section 3, and injunction under section 4, and forfeiture under section 6 of the Sherman Act * * *.
>
> "* * * But anyway, the net result of the Keogh decision was to limit the force of section 7 of the Sherman Act, as related to wrongs for which there was a money-damage remedy afforded under the Interstate Commerce Act."

1946 Senate Hearings at 1148. Commissioner Aitchison also referred to *Keogh* as an attempt by Justice Brandeis "to reconcile the antitrust laws with the Commerce Act" (*id.* at 1161), and noted that the *Georgia* decision was so "fresh in the minds of the committee" that he did "not feel it is necessary" to do more than advert to the fact of that decision (*id.* at 1148).[14]

No witness in the Reed-Bulwinkle hearings and no member of Congress urged that the *Keogh* doctrine, either as established in *Keogh* or as applied in *Georgia* (or else-

[14] Arne C. Wiprud also cited *Keogh* and quoted a portion of the *Georgia* opinion which pointed out that *Keogh* "held that damages could not be recovered," while stating "that a conspiracy to fix rates would be illegal even though the rates fixed were reasonable and nondiscriminatory." 1946 Senate Hearings at 581. Mr. Wiprud, then in private practice, had in 1941-45 headed the Transportation Section, Antitrust Division, Department of Justice. 1946 Senate Hearings at 553; 1947 House Hearings at 229. He also quoted references in the *Georgia* opinion to *Keogh* in the 1946 Senate Hearings at 571-572, cited *Keogh* directly in the 1947 House Hearings at 244 for the proposition that the Government could enjoin joint rate-fixing as a violation of the Sherman Act "but a private individual had recourse to the Interstate Commerce Commission," and noted (*id.* at 245) that "the Keogh case has been repeatedly cited with approval by the Supreme Court." See also *id.* at 272. *Keogh* also was cited and quoted by Wendell Berge, 1946 Senate Hearings at 799, 1947 Senate Hearings at 73-74, and 1947 House Hearings at 191, who was then Assistant Attorney General in charge of the Antitrust Division (1946 Senate Hearings at 739 and 1947 Senate Hearings at 57); and by William L. McGovern, 1946 Senate Hearings at 1456, Deputy Assistant Attorney General of Georgia (*id.* 1455).

where), was no longer good law, or should not be the law, or constituted an improper or undesirable accommodation of the ICA and the antitrust laws, or otherwise had been or should be nullified by the Congress or by the courts.[15] Even the opponents of the bill did not criticize the *Keogh* doctrine or suggest that it be limited or nullified in any way.[16] Rather, they contended that this Court's decisions up to and including *Georgia* had appropriately accommodated the ICA and the antitrust laws so that there was no need for the extension of ICC jurisdiction to cover rate-making agreements, with a concomitant exemption from the antitrust laws, as proposed in the bill. Assistant Attorney General Berge testified, for example, that there was no "confusion" as to the application of the antitrust laws "to the railroads" as "there are long lines of judicial decisions that mark them out," culminating in the *Georgia* decision, which case when finally decided would further make a pronouncement "as to what that permissible field of collaboration is" (1946

[15] None of the legislative history of Reed-Bulwinkle relied upon by petitioners (Br. at 21-26) is to the contrary, as seems apparent from the excerpts quoted by petitioners and is even clearer in context. For example, Mr. Sam Winn, who is quoted by petitioners (Br. at 28) to the effect that, under the bill, rate-making agreements would be relieved from the operation of the antitrust laws only to the extent that they are approved by the ICC, also pointed out that the antitrust laws, upon "passage of the bill, * * * will continue to apply, *insofar as they are now applicable,*" except for the additional antitrust immunity provided therein for approved agreements. 1946 Senate Hearings at 367 (emphasis added). See generally *id.* 365-370.

[16] The principal opponents were the Department of Justice, with testimony or submissions by Attorney General Tom C. Clark, Assistant Attorney General Berge, and Special Assistants James E. Kilday and Albert Boggess (1945 House Hearings at 3-5, 1946 Senate Hearings at 739-1108, 1462-1529, 1947 Senate Hearings at 57-81, and 1947 House Hearings at 156-217); the State of Georgia, by Governor Arnall and Mr. McGovern (1946 Senate Hearings at 417-551, 1455-62, 1945 House Hearings at 379-81); and Arne Wiprud (1946 Senate Hearings at 553-630, 1947 Senate Hearings at 118-23, and 1947 House Hearings at 229-83).

Senate Hearings at 742); that the "Congress has already made the policy and there is nothing wrong with it and there isn't any occasion to change it; that the only occasion for change would be if the policy of Congress were misinterpreted by the courts or if the detailed application of the policy as it is made in court decisions were unsatisfactory to Congress" (*id.* at 781-82); and that he didn't "see how Congress can conclude that the policy which it has had in effect for half a century should be changed until there is a final court decision" in the *Georgia* case (*id.* at 822).

The committee reports also point out that the public interest would not be left unprotected:

> "While the approval of the basic agreement * * * operates to remove from the application of the antitrust laws any action taken thereunder * * *, it should be noted that the application of * * * the Interstate Commerce Act * * * is unaffected by the granting of relief from the antitrust laws. Any person dissatisfied with any such action has the right to complain thereof to the Commission * * *."

S. Rep. No. 44, *supra*, at 14, generally, at 13-14; *accord*, H.R. Rep. No. 1100, *supra*, at 11-12. In addition, § 5a(7) of the Reed-Bulwinkle amendment authorized the ICC "upon complaint or upon its own initiative" to investigate a previously-approved agreement and to "terminate or modify its approval" if necessary. That provision was intended to assure that the "public interest * * * will be adequately protected" by enabling the ICC "to correct situations which may develop through the operation of agreements in ways which were not foreseen at the time of the original grant of approval." H.R. Rep. No. 1100, *supra*, at 16. "The fact that questions of this character will be confined to the Commission for decision will result in a uniformity in the administration of the law which can only come by vesting control in a single body. In view of the national scope of the transportation system

diversity of decision must be avoided because of the chaos it would create." S. Rep. No. 44, *supra*, at 15-16.

As Judge Friendly concluded, the legislative history of Reed-Bulwinkle "refutes the contention that Congress intended to overrule the *Keogh* doctrine in enacting the legislation." Pet. App. 20a. Rather, as we have shown, Congress, with full knowledge of the *Keogh* doctrine as reaffirmed and applied in *Georgia*, accepted that doctrine while providing additional antitrust immunity for rate bureaus that had been found to be lacking in *Georgia*.[17]

III. There Have Been No Judicial Developments That Would Justify Overruling the Long-Established *Keogh* Doctrine.

The Government's principal argument appears to be that *Keogh* has been so eroded by subsequent developments in the law that it now should be overruled (see U.S. Br. 7-21). But the law was not in such a primitive state as the Government claims when *Keogh* was decided, and the "developments" upon which the Government relies reflect doctrines that had matured when *Georgia* reaffirmed and applied the *Keogh* doctrine—as, indeed, is demonstrated by the Government's own citations.[18] More-

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[17] The fact that the Congress in Reed-Bulwinkle provided an express antitrust immunity in the circumstances there specified is not inconsistent with an implied immunity resulting from other provisions of the ICA, much less with *Keogh*'s preclusion of antitrust damages. Indeed, when *Keogh* was decided, § 5 of the ICA as enacted by the Transportation Act of 1920 (41 Stat. 480-482) provided express antitrust immunity for pooling agreements, mergers and consolidations approved by the ICC, and that continued to be true (as amended and expanded by the Transportation Act of 1940, 54 Stat. 905-10) when *Georgia* was decided. See also, *e.g.*, *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 691 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978).

[18] Perhaps this is why the reaffirmation of *Keogh* in *Georgia* virtually has been ignored by the Government, *e.g.*, U.S. Br. 8 n.8.

over, the principles of *stare decisis* weigh heavily against overruling a doctrine that has been established and followed for more than 60 years even if some of its underlying bases have been eroded.

United States v. *Borden Co.*, 308 U.S. 188 (1939), is among the cases cited by the Government for the proposition that the availability of an administrative remedy does not necessarily evidence an intent to deny relief under the antitrust laws—regulated industries are not *per se* exempt from the antitrust laws (see U.S. Br. 8-11). But *Borden* was referred to in the *Georgia* opinion for the same proposition (324 U.S. at 456).

Class actions under Fed. R. Civ. P. 23 (U.S. Br. 12) also preceded *Georgia*, having been available since those Rules became effective in 1938.

The possibility of a reference to the ICC under the primary jurisdiction doctrine (see U.S. Br. 12-13) was considered and rejected in *Keogh* itself (260 U.S. at 164). Moreover, the cases relied upon by the Government in that connection include *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940) (U.S. Br. 13 n.17), and *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337 (1944) (U.S. Br. 13 & 14 n.18), both decided prior to *Georgia*.

While this Court did not definitely reject the "pass-on" theory until 1968, that theory had been rejected in a railroad-rate context even prior to the *Keogh* decision, in *Southern Pacific* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), and the reference to that theory in *Keogh* was a *dictum*, as this Court noted in rejecting the "pass-on" theory. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968). See U.S. Br. 14. Moreover, the leading case cited by the Government for present-day principles regarding the proof of antitrust damages is *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (U.S. Br. 14-15), decided some 14 years before *Georgia*.

The presumption against implied antitrust immunity relied on by the Government (U.S. Br. 15-16) was involved in *United States* v. *Borden, supra,* which is cited by the Government (*id.* 16). *Borden* was cited in *Georgia* for the identical proposition that "[o]nly a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." 324 U.S. at 457.

The proposition that there is a "zone of reasonableness" under the ICA so that more than one level of rates may be reasonable, and the related proposition that carriers generally retain the initiative in ratemaking (U.S. Br. 17-19), both antedate and are referred to in *Georgia.* Thus *Georgia* noted that the "Act was designed to preserve private initiative in rate-making," 324 U.S. at 459, citing *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U.S. 370 (1932), and quoted the very case relied upon by the Government—*United States* v. *Chicago, M., St. P. & Pac. R.R.,* 294 U.S. 499 (1935) (U.S. Br. 18)—for the "zone of reasonableness," 324 U.S. at 460-461.

In short, the judicial developments which the Government contends have so eroded the *Keogh* doctrine as to justify overruling what has been established and followed for more than 60 years are at most further applications and refinements of principles that were well established when *Georgia* held that the "reasoning and precedent" of *Keogh* "apply with full force here" so as to bar the recovery of antitrust damages based upon rates filed with the ICC. 324 U.S. at 453. Moreover, a reading of these cases demonstrates that in general they relied upon already-established doctrines antedating *Keogh* rather than enunciating new departures in the law.[19] Hence,

[19] *Borden* (308 U.S. at 198-199), *General American Tank Car Corp.* (308 U.S. at 432-433), and *Arizona Grocery Co.* (284 U.S. at 384), each relied for the propositions relevant here on a prior decision or decisions by this Court that antedated *Keogh. Chicago, M., St. P. & Pac. R.R.* (294 U.S. at 506) cited *United States* v. *Illinois Cent. R. Co.,* 263 U.S. 515, 524 (1924), a Brandeis opinion that in turn cited the pre-*Keogh* Brandeis opinion in *American Express Co.* v. *Caldwell,* 244 U.S. 617, 624 (1917), for the "zone of reasonableness." *Story Parchment Co.* (282 U.S. at 565-566) cited *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791, 802 (2d Cir. 1924), and "[n]umerous decisions * * * there cited * * *," which include *Hetzel* v. *Baltimore & Ohio Railroad,* 169 U.S. 26, 37-39 (1898), with respect to the principles governing proof of damages. Class actions also antedated *Keogh. Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921).

there have been no subsequent judicial developments that would justify overruling the *Keogh* doctrine as confirmed and applied in *Georgia* even apart from the weighty considerations underlying the doctrine of *stare decisis.*

Even if the bases for the *Keogh* doctrine had been eroded, more than "a half century of unwavering precedent weighs heavily against any suggestion that [the Court] now discard the settled" *Keogh* doctrine. *Miller* v. *Fenton,* 54 U.S.L.W. 4022, 4025 (U.S., Dec. 3, 1985). As the Court there noted, "'[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions.'" *Id.,* quoting *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 403 (1970).

Where Congress has acquiesced in a long-standing ruling interpreting a federal statute, this Court's settled practice is to adhere to past decisions and leave any modification to Congress. *E.g., Southern Motor Carriers Rate Conf.* v. *United States,* 53 U.S.L.W. 4422, 4424 n.18 (U.S., Mar. 27, 1985) (declining to overturn the state-action doctrine "after over 40 years of congressional acquiescence"); *Flood* v. *Kuhn,* 407 U.S. 258, 282 (1972). That policy counsels heavily in favor of rejecting any effort to revise, at this late date, an important and long-established principle of transportation law.

IV. The Government's Policy Objections to the *Keogh* Doctrine Are Unsound.

The Government argues that *Keogh* should be overruled here either because there is no conflict between the treble damage remedy and the ICC's rate authority (U.S. Br.

15-21) or, if there is such a conflict, because *Keogh* no longer represents a good accommodation of that conflict (*id.* 21-27). As we show elsewhere, the conflict perceived by the Court in *Keogh* was real; continued to be real throughout the period at issue in this case; and continues to be real where Congress has retained the ICC's rate authority. We demonstrate here that the Government's objections to *Keogh*'s accommodation of antitrust and transportation policy are unsound wherever the ICC continues to regulate filed rates. In such areas, maintaining a uniform system of rate regulation administered by a single agency, as Congress prescribed, warrants foregoing any inducements to private antitrust enforcement that may have been lost by limiting plaintiffs to damages under the ICA.

The Government contends that "damage actions would further the fundamental national policies underlying the antitrust laws" (U.S. Br. 6) and that allowing shippers to maintain such actions "would provide an effective incentive for carriers to comply with their ICC-approved agreements and thus would materially further the purposes of the Interstate Commerce Act" (*id.* 22). The Government acknowledges that this Court has already approved an ICC remedy which "encourages 'carriers to limit their collective activities to the areas that Congress described in the statutory guidelines'." U.S. Br. 22-23, citing *ICC* v. *American Trucking Ass'ns, Inc.*, 52 U.S.L.W. 4709, 4713 (June 5, 1984). It does not explain why damages under that remedy, which could exceed treble damages, *id.*, are an inadequate incentive for carriers to comply with approved rate-bureau agreements and the purposes of the ICA. Nor does the Government explain how this position is consistent with the express recognition by this Court that Congress intended the ICC to play the key role in holding carriers to the statutory provisions dealing with rate-bureau agreements. *Id.*[20]

[20] "[T]he procedures governing the administration of § 14 [of the Motor Carrier Act of 1980, amending the successor to the Reed-Bulwinkle provision] demonstrate that Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of the guidelines. It is, after all, the Commission that decides which bureau agreements conform to the dictates of § 14. 49 U.S.C. § 10706(b)(2). It is the Commission that is empowered to terminate or suspend rate-bureau agreements. § 10706(f), (h). And, it is the Commission that may impose conditions on rate-bureau agreements in order to further National Transportation Policy. § 10706(b)(2)." *ICC* v. *American Trucking Ass'ns, Inc.*, 52 U.S.L.W. at 4713. See also *id.* n.9 & pp. 17-18 *supra*.

In fact, the Government's incentive argument misses the point—criminal liability, civil injunctions, and ICC remedies which may exceed treble damages are surely adequate incentives to comply with the law. The important point is that *Keogh* preserves the discretionary authority of the ICC to accommodate the policies of the ICA in administering damage remedies.[21] For example, in another case now before this Court,[22] the ICC had taken into account the technical nature of a violation of a required rate-bureau procedure and equitable considerations that "we cannot ignore" under the policies of the ICA in refusing to award reparations to shippers, although cancelling prospectively the tariff involved. *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890, 898-901 (1982). *Keogh* protects the ICC's authority to balance the interests involved in such cases, and it was on that basis that the Seventh Circuit dismissed the shippers' subsequent treble damage action. 759 F.2d at 1309-1316. The Government and petitioners offer no sound reason for abandoning a flexible remedial process under which an expert administrative agency has discretion to accommodate relevant policies

[21] Whether a violation of rate-bureau procedures is "knowing" has no bearing on the continuing validity of *Keogh's* accommodation policy. *Keogh* has always applied to knowing violations, and the ICC has the discretion to take account of the nature of a carrier's action when it administers remedies under the ICA.

[22] *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co.* v. *Baltimore & Ohio Railroad*, 54 U.S.L.W. 3085 (U.S., July 16, 1985) (No. 85-112).

for the rigid application of treble damage remedies by antitrust courts and juries.[23]

The Government contends that the ICC's exclusive jurisdiction to apply the substantive standards of the ICA is not implicated because of the "zone of reasonableness" applicable to common carrier rates under the Act. U.S. Br. 17-18. But even conceding that the "reasonableness" of a rate contained in a filed tariff does not establish that a lower rate is necessarily "unreasonable," whether a rate is within the zone of reasonableness is for the ICC. Further, even if "reasonable," there remains the issue of whether it is "discriminatory"—again, something only the ICC can decide.[24]

The Government suggests that referral to the ICC of matters falling within its jurisdiction, including the validity under the ICA of the "hypothetical rate" upon which antitrust damages would be calculated, would avoid the problems that gave rise to *Keogh*. U.S. Br. 19-20, nn. 25 & 26. But that is simply not the case. Even assuming the ICC could overcome the difficulties of determining the

[23] When faced with the problem, Congress has recognized clearly the need for the ICC to accommodate transportation and antitrust policy, as the history of Reed-Bulwinkle shows. "It is obvious that confusion and uncertainty are inevitable where these two principles of public policy, administered and enforced by different agencies, are applied in such a way that there is conflict between them." H.R. Rep. No. 1100, *supra*, at 5; S. Rep. No. 44, *supra*, at 7. The Congress concluded that the "only practical approach" is to entrust that task "to a competent administrative agency," and determined that, since "this problem arises in the relatively circumscribed field of transportation, the agency which is peculiarly well qualified to exercise this authority is the [ICC]." *Id.*

[24] Petitioners (Br. 34-35) and the Government (U.S. Br. 12-13) contend that the availability of class actions obviates any concern that antitrust damage actions might advantage some shippers over others in a manner inconsistent with the ICA. But the parties in the certified class may not include all of the parties who may claim protection against discrimination under the ICA. Since the antidiscrimination provisions of the ICA give shippers and others adverse, not common interests, Rule 23 cannot solve the problem identified in *Keogh*.

lawfulness of rates that could conceivably have been changed every few months over the 16-year period in this case from 1966 to 1981, that would not solve the problem. The rates were the only lawful rates under the law; the ICC is without authority now to suspend or set them aside retroactively to the 1966 to 1981 period, 49 U.S.C. § 11706(c)(2); and antitrust damages awarded by court or jury would be substituted for the flexible remedies administered by the ICC.

The soundness of the accommodation reached in *Keogh* is thus shown by the cases now before this Court. Plaintiffs could have challenged the rates contained in respondents' tariffs before the ICC; such a challenge could have won damages for any injury suffered within two years of the challenge and would have allowed the ICC to adjust the overall rate structure of which those rates were a part.[25] Having failed to invoke the regulatory regime intended by Congress to deal with rate issues, petitioners should not now be allowed to use an antitrust action to rewrite rate history over a 16-year period.

V. Recent Rail Legislation Offers No Basis for Arguing That *Keogh* Has Been Repudiated, Although Some Rail Traffic Is No Longer Regulated So As To Be Protected by *Keogh*.

Since 1948, the ICA has been amended several times, but the regulatory regime remained essentially unchanged until the Motor Carrier Act of 1980, 94 Stat. 793, and the Staggers Rail Act of 1980, 94 Stat. 1895. The effect of the changes made by those statutes on *Keogh* is not

[25] Contrary to the contention of petitioners (Br. 11-15) and the Government (U.S. Br. 19-20), the ICA system did not depend on any review of tariff filings by the ICC on its own initiative. It was the power of shippers and others to invoke the ICC's jurisdiction that was critical. In the hearings on the Reed-Bulwinkle Act, the Department of Justice asserted that even then only about one percent of the rates filed with the ICC were reviewed by that agency and that it would be impossible to review all of them. See, *e.g.*, 1946 Senate Hearings at 795, 804, 814 (Assistant Attorney General Berge).

before this Court. The Staggers Act is not here, of course, since this case involves motor carriers. As to the 1980 Motor Carrier Act, petitioners are seeking damages for conduct that began in 1966 and ended in 1981, just after the effective date of that Act. The Second Circuit stated that "appellants have not asked us to treat their claims arising after October 1, 1980 differently from those arising before that date * * *," Pet. App. 17a, and petitioners have not contested that assertion here. Thus none of the 1980 legislation has any application to this case.

Nevertheless, the Government contends that the continuation of the *Keogh* bar to treble damage actions is inconsistent with the heightened emphasis on competition contained in that legislation, particularly the Staggers Act. U.S. Br. 23-25. We have left to the parties any description of the 1980 Motor Carrier Act, but the Government is certainly incorrect in suggesting that the Staggers Act indicates Congressional repudiation of *Keogh*. While some rail traffic has been essentially deregulated, other rail traffic remains subject to ICC rate regulation. In the case of such regulated rail traffic, the rationale for maintaining the *Keogh* doctrine remains valid.

The purpose of the Staggers Act was "to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the National rail system." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess., at 80 (1980).[26] The means Congress

[26] As the committee reports make clear, even though the ICA had been intended to ensure a healthy rail industry, the results had been far different. See, *e.g.*, S. Rep. No. 96-470, at 2-6 (1979); H.R. Rep. No. 96-1035, at 34-35 (1980). In response to such concerns, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, but by 1980 it was generally recognized that the limited measures of that legislation had "not achieved their intended results." S. Rep. No. 96-470 at 5 (1980).

chose to pursue this goal was not a wholesale deregulation of the rail industry with unqualified application of the antitrust laws. Instead, Congress sought to eliminate unnecessary and burdensome regulation, so as to assure rail carriers the opportunity to earn adequate revenues, while preserving those aspects of regulation—including ICC oversight of rates—that were deemed to be needed to protect the interests of shippers.

In two areas the Staggers Act substantially changed the pre-existing regime of regulated tariff rates.[27] The normal provisions on tariff filing and rate regulation are lifted, first, where railroads and shippers enter into contracts governing rates and other terms of service,[28] and, second, where the ICC exempts a carrier, transaction, or category of rail service from the usual statutory requirements.[29] But while the contract and exemption provisions are undeniably significant, they do not cover the field. Rail traffic that is not exempted or subject to a Staggers

[27] The Act also substantially revised the standards governing rate bureau activities. 49 U.S.C. § 10706(a)(3) prohibits rate bureaus from permitting any rail carrier to discuss, agree on, or vote on single line rates and rates related to an interline movement in which that carrier does not participate. As a result, rate bureau activity among rail carriers is now substantially limited.

[28] Such contracts are filed with the ICC, which has limited disapproval authority. 49 U.S.C. § 10713(b)-(d). Contracts approved by the ICC and transportation under such contracts are not otherwise subject to the requirements of the ICA, *id.* § 10713(i)(1), including the requirement of adherence to rates in published tariffs. See *id.* § 10713(b) and 49 C.F.R. § 1312.41 (special tariff rules for contracts). A substantial volume of rail traffic now moves under such contracts.

[29] Pursuant to the exemption provision, 49 U.S.C. § 10505, the ICC has exempted several significant categories of rail service from regulation, including tariff filing requirements and rate regulation. *See, e.g.*, 49 C.F.R. § 1039.10 (certain agricultural commodities); § 1039.11 (frozen foods); § 1039.13 (trailer-on-flatcar and container-on-flatcar traffic); § 1039.14 (boxcar traffic), *affirmed in part, vacated in part, & remanded, Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3771 (U.S., April 29, 1985).

Act contract is still governed by tariffs that must be filed with the ICC and held open for public inspection, 49 U.S.C. § 10762. Rail carriers are required to adhere to the rates set forth in such published tariffs, *id.* § 10761(a), and to comply with the antidiscrimination provisions of § 10741.

Moreover, the ICC retains its longstanding rate reasonableness jurisdiction over tariff rates as to which it finds "market dominance." [30] Rail rates for market dominant traffic "must be reasonable," 49 U.S.C. § 10701a(b)(1), and the ICC may find such a rate "to be unreasonable if it exceeds a reasonable maximum" for the transportation in issue. *Id.* § 10709(c). A proceeding to determine whether a particular rail movement is market dominant and whether the applicable rate exceeds a reasonable maximum may be commenced either by the ICC on its own initiative or upon a complaint brought by a shipper. *Id.* §§ 10707(a), 11701(a), (b). If the ICC determines that the rate is unreasonable, it may order the rail carrier to stop charging that rate and prescribe the rate to be charged for the future, *id.* § 10704(a)(1), and, where appropriate, award damages, *id.* § 11705(b)(2). This same array of ICC powers and remedies is available with respect to tariff rates that are discriminatory under § 10741 or unreasonably low under § 10701a(b)(3). Thus, as to market-dominant traffic, the ICC continues to exercise, with some modification, the range of rate regulatory responsibilities and remedial powers that were vested in the ICC at the time of *Keogh*.

[30] "Market dominance" is "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10709(a). Market dominance exists where the ICC finds that the rate charged for the subject traffic exceeds a statutorily specified level, expressed in terms of a ratio of revenue to variable costs, *id.* § 10709(d)(2), and that there is an absence of effective competition for the subject traffic, *id.* §§ 10709(b) & -(d)(4). Rates for non-market-dominant traffic can be challenged as discriminatory under § 10741 or as unreasonably low under § 10701a(b)(3), but not as unreasonably high.

Since rail rate regulation now varies with the category of traffic, determining the continuing applicability of the *Keogh* doctrine to particular classes of rail traffic requires careful attention to the nature of the applicable regulatory regime. This motor carrier case, of course, is not the place for that analysis. Nevertheless, while the Staggers Act may have directly or, through later ICC exemption orders, indirectly limited the scope or application of the *Keogh* doctrine with respect to particular traffic, that Act is consistent with the continued vitality of the doctrine where carriers continue to be subject to the full rate regulatory and remedial regime of the ICA, including the requirement that carriers adhere to rates filed in published tariffs. Certainly in those areas, the policies underlying the *Keogh* doctrine continue to apply. Thus, the Act cannot be read as expressly or implicitly repudiating the *Keogh* doctrine. Still less can it be read, as the United States suggests, as supporting the conclusion that the *Keogh* doctrine had lost all validity before 1980.

VI. If *Keogh* Is To Be Overruled, This Court Should Make That Ruling Prospective Only.

If there is to be an overruling, it should be prospective only. While this Court does not always address retroactivity when it announces a new rule, it should determine the issue in this case to avoid the tremendous litigation costs that would accrue before the issue is settled. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982). Application of the three-factor analysis of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), demonstrates the inappropriateness of a retroactive overruling. The absence of any single factor does not require that a new rule be retroactive, but in this case all three factors strongly favor prospectivity.

First, the Court would obviously be "overruling clear past precedent on which litigants may have relied," 404 U.S. at 106, if it adopts the arguments of the petitioners or the United States. Since 1922 railroads and other

carriers have looked to ICC policies and practices in setting the level of their rates, and aggrieved parties have looked to the ICC for remedies.

Second, to the extent that the availability of treble damages is intended to deter conduct that may be unlawful under the Sherman Act, retroactivity will not "further * * * its operation." 404 U.S. at 106-07. The conduct at issue is long past.

Third, the "inequity imposed by retroactive application," 404 U.S. at 107, is clear. Businesses shape their affairs, and regulate their conduct, on the basis of the accepted rule. Overruling *Keogh* retroactively would unfairly penalize railroads by subjecting them to substantial potential liabilities under standards not then applicable. On the other hand, shippers have always had available the remedies afforded by the ICA, and the Government had available criminal and civil injunctive remedies under the antitrust laws. Congressional repeal of *Keogh* surely would have been prospective only; if this Court reverses course after sixty-three years, the same rule should apply.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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STATUTORY APPENDIX

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Selected Provisions of the Interstate Commerce Act, as amended and supplemented through January 18, 1976, as published in 49 U.S. Code (1970 ed. & Supp. V 1975)*

Note preceding § 1.

NATIONAL TRANSPORTATION POLICY

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters, 1, 8, 12, 13 and 19 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy:"

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title) so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of

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* The numbers of the sections of 49 U.S.C. that appear here are identical to the numbers of the Interstate Commerce Act sections, except that 49 U.S.C. § 5b was § 5a of the Act (added by Reed-Bulwinkle) and 49 U.S.C. § 41 was § 1 of the Elkins Act.

the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * *

§ 1. Regulation in general; car service; alteration of line.

(1) Carriers subject to regulation.

The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

* * * *

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.

(2) Transportation subject to regulation.

* * * *

(3) Definitions.

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter

shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * *

(4) Duty to furnish transportation and establish through routes; division of joint rates.

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable

facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates,. fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(5½) Exchange of services.

* * * *

(6) Classification of property for transportation; regulations and practices.

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling,

transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

(7) Free transportation for passengers prohibited; exceptions; penalty.

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(8) Transportation of commodity manufactured or produced by railroad forbidden.

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(9) Switch connections and tracks.

Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line railroad, such shipper or owner of such lateral branch line of railroad, may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission

may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

(10) "Car service" defined.

The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter.

(11) Duty to furnish car service; rules and regulations.

It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) Distribution of coal cars; failure to prorate; penalty.

It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) Rules and regulations as to car service to be filed, etc.

The Commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto.

(14) Establishment by Commission of rules, etc., as to car service.

(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, de-

termine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements of the Commission finds it to be in the national interest.

* * * *

(15) Powers of Commission in case of emergency.

Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the

public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Rerouting of traffic on failure of initial carrier to serve public.

(a) Whenever the Commission is of opinion that any carrier by railroad subject to this chapter is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagree-

ment, as the Commission may after subsequent hearing find to be just and reasonable.

* * * *

(17) Directions of Commission as to car service; disobedience; rights of States; bribery.

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(18) Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) Application for certificate of Commission; notice and hearing.

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(20) Issuance of certificate by Commission; unlawful extension or abandonment of lines.

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(21) Power of Commission to require adequate facilities or extension of line; penalty.

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(22) Construction, etc., of spurs, switches, etc., within State.

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(Feb. 4, 1887, ch. 104, pt. I, § 1, 24 Stat. 379; June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Apr. 13, 1908, ch. 143, 35 Stat. 60; June 18, 1910, ch. 309, § 7, 36 Stat. 544; May 29, 1917, ch. 23, 40 Stat. 101; Feb. 28, 1920, ch. 91, §§ 400-403, 41 Stat. 474-479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, §§ 2, 3(a), (b), 4, 54 Stat. 899-901; June 24, 1948, ch. 622, 62 Stat. 602; Aug. 2, 1949, ch. 379, § 1, 63 Stat. 485; June 27, 1952, ch. 477, title IV, § 402(g), 66 Stat. 277; Aug. 12, 1958, Pub. L. 85-625, § 3, 72 Stat. 570; May 26, 1966, Pub. L. 89-430, § 1, 80 Stat. 168; Jan. 2, 1974, Pub. L. 93-236, title VI, § 601(e), 87 Stat. 1021.)

§ 2. Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty

of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, ch. 104, pt. I, § 2, 24 Stat. 379; Feb. 28, 1920, ch. 91, § 404, 41 Stat. 479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 3. Preferences; interchange of traffic; terminal facilities.

(1) Undue preferences or prejudices prohibited.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(1a) Export rates on farm commodities; Commission's power to carry out policy.

It is declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is directed, on its own initiative or an application by interested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy.

* * * *

(4) Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

(5) Terminal facilities; use of and compensation for.

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed

for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Feb. 4, 1887, ch. 104, pt. I, § 3, 24 Stat. 380; Feb. 28, 1920, ch. 91, § 405, 41 Stat. 479; Mar. 4, 1927, ch. 510, § 1, 44 Stat. 1447; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Aug. 12, 1935, ch. 509, 49 Stat. 607; Sept. 18, 1940, ch. 722, title I, § 5(a), (c)-(f), 54 Stat. 902; Aug. 2, 1949, ch. 379, § 2(a), 63 Stat. 485.)

§ 4. Long and short haul charges; competition with water routes.

(1) Charges for long and short hauls and on through route; exemption.

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the long distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission

may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this chapter, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

(2) Competition of railroads with water routes; change of rates.

Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates

unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. (Feb. 4, 1887, ch. 104, pt. I, § 4, 24 Stat. 380; June 18, 1910, ch. 309, §8, 36 Stat. 547; Feb. 28, 1920, ch. 91, § 406, 41 Stat. 480; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 6(a), 54 Stat. 904; July 11, 1957, Pub. L. 85-99, 71 Stat. 292; Sept. 27, 1962, Pub. L. 87-707, 76 Stat. 635.)

§ 5. Combinations and consolidations of carriers.

(1) Pooling; division of traffic, service, or earnings.

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: * * *.

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraphs—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate

transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * *

(11) Plenary nature of authority under section.

The authority conferred by this section shall be exclusive and plenary * * *; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain and operate any properties and exercise any control or franchises acquired through such transaction. * * *

* * * *

(Feb. 4, 1887, ch. 104, pt. I, § 5, 24 Stat. 380; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 566; Feb. 28, 1920, ch. 91, §§ 407, 408, 41 Stat. 480, 482; June 10, 1921, ch. 20, 42 Stat. 27; June 16, 1933, ch. 91, title II, §§ 201-203, 48 Stat. 217-220; June 19, 1934, ch. 652, § 221, 48 Stat. 1080; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 7, 54 Stat. 905; Aug. 2, 1949, ch. 379, §§ 3, 4, 63 Stat. 485; July 27, 1965, Pub. L. 89-93, § 1, 10 Stat. 284.)

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§ 5b. Agreements between carriers.

(1) Definition of "carrier" and "antitrust laws".

For purposes of this section—

(A) The term "carrier" means any common carrier subject to chapters 1, 8, or 12 of this title or any freight forwarder subject to chapter 13 of this title; and

(B) The term "antitrust laws" has the meaning assigned to such term in section 12 of Title 15.

(2) Application to Commission for approval of agreements; rules and regulations.

Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) Maintenance of accounts and records by conferences, bureaus, committees, etc.

Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files,

and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(4) Agreements between carriers of different classes.

The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipeline companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) Pooling or division agreements.

The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this title is applicable.

(6) Agreements for determining matters through joint consideration.

The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

(7) Investigation of prior approved agreements; termination or modification of approval; effective date.

The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2) of this section, or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(8) Hearings.

No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Relief from operation of antitrust laws.

Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

(10) Effect of Commission's action.

Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9) of this section. (Feb. 4, 1887, ch. 104, pt. I, § 5a, as added June 17, 1948, ch. 491, 62 Stat. 472.)

§ 6. Schedules and statements of rates, etc., joint rail and water transportation.

(1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(2) Schedule of rates through foreign country.

* * * *

(3) Change in rates, fares, etc.; notice required; simplification of schedules.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make

suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) Copies of traffic contracts to be filed.

Every common carrier subject to this chapter shall also file with said Commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party: *Provided, however,* That the Commission, by regulations, may provide for exceptions from the requirements of this paragraph in the case of any class or classes of contracts, agreements, or arrangements, the filing of which, in its opinion, is not necessary in the public interest.

(6) Form and manner of publishing, filing, and posting schedules; unlawful use.

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with

it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(7) Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) Preference to shipments for United States.

In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material or war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

(9) Schedule lacking notice of effective date.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(10) Penalty for failure to comply with regulations.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of $500 for each such offense, and $25 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

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(Feb. 4, 1887, ch. 104, pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; June 29, 1906, ch. 3591, § 2, 34 Stat. 586; June 18, 1910, ch. 309, § 9, 36 Stat. 548; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 568; Aug. 29, 1916, ch. 417, 39 Stat. 604; Feb. 28, 1920, ch. 91, §§ 409-413, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 8, 54 Stat. 910; Aug. 2, 1949, ch. 379, § 5, 63 Stat. 486.)

§ 7. Combinations to prevent continuous carriage of freight prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the

place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this chapter. (Feb. 4, 1887, ch. 104, pt. I, § 7, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 8. Liability in damages to persons injured by violation of law.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (Feb. 4, 1887, ch. 104, pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 9. Remedies of persons damaged; election; witnesses.

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States

of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit. (Feb. 4, 1887, ch. 104, pt. I, § 9, 24 Stat. 382; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Oct. 15, 1970, Pub. L. 91-452, title II, § 243(a), 84 Stat. 931.)

§ 10. Violation of regulations by carrier; discrimination; penalties.

(1) Violation by carrier or officer; penalty.

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of

the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) False billing or classification by carrier; penalty.

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(3) Obtaining lower rates by false billing, etc., or by false claim; penalty.

* * * *

(4) Inducing unjust discrimination; penalty, liability for damages.

* * * *

(Feb. 4, 1887, ch. 104, pt. I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309, § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

* * * *

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions.

Said Commissions shall, in like manner and with the same authority and powers, investigate any complaint

forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

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(Feb. 4, 1887, ch. 104, pt. I, § 13, 24 Stat. 383; June 18, 1910, ch. 309, § 11, 36 Stat. 550; Feb. 28, 1920, ch. 91, § 416, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(b, c), 54 Stat. 910; Aug. 12, 1958, Pub. L. 85-625, § 4, 72 Stat. 570.)

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§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) Orders of Commission.

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment

of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specific period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(3) Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(4) Through routes to embrace entire length of railroad; temporary through routes.

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(5) Transportation of livestock in carload lots; services included.

* * * * *

(6) Commission to establish just divisions of joint rates, fares, or charges; adjustments.

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circum-

stance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commisison any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by

reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(8) Shipper's choice of route to be observed.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this chapter to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this chapter provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefore as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said

line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

(9) Liability of carriers where property is delivered contrary to routing instructions.

Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

(10) Direction of unrouted traffic by Commission.

With respect to traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier, and is to be there delivered to another carrier.

(11) Disclosure or solicitation of information concerning shipments unlawful; exceptions.

It shall be unlawful for any common carrier subject to the provisions of this chapter, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportaion, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided*, That nothing in this chapter shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any State or Federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(12) Penalty for violation of preceding provisions.

Any person, corporation, or association violating any of the provisions of paragraph 11 of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than $1,000.

(13) Allowance for services or facilities furnished by shipper.

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or funishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) Other powers of Commission not excluded.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter. (Feb. 4, 1887, ch. 104, pt. I, § 15, 24 Stat. 384; June 29, 1906, ch. 3591, § 4, 34 Stat. 589; June 18, 1910, ch. 309, § 12, 36 Stat. 551; Feb. 28, 1920, ch. 91, §§ 418-421, 41 Stat. 484-488; Mar. 4, 1927, ch. 510, § 2, 44 Stat. 1447; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 10(a-d), 54 Stat. 911, 912.)

§ 15a. Fair return for carriers.

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the

movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act. (Feb. 4, 1887, ch. 104, pt. I, § 15a, as added Feb. 28, 1920, ch. 91, § 422, 41 Stat. 488, and amended June 16, 1933, ch. 91, title II, § 205, 48 Stat. 220; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 10(e), 54 Stat. 912; Aug. 12, 1958, Pub. L. 85-625, § 6, 72 Stat. 572.)

* * * *

§ 16. Orders of Commission and enforcement thereof.

(1) Award of damages.

If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) Proceedings in courts to enforce orders; costs; attorney's fee.

* * * *

(3) Limitation of actions.

(a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within three years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) of this paragraph or of the three-year period of limitation in subdivision (c) of this paragraph a carrier subject to this chapter begins action under subdivision (a) of this paragraph for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

(h) The provisions of this paragraph shall extend to and embrace cases in which the cause of action accrued prior to June 7, 1924, as well as cases in which the cause of action accrues thereafter, except that actions at law begun or complaints filed with the Commission against carriers subject to this chapter for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) of this paragraph if such actions shall have been begun or complaints filed prior to June 7, 1924, or within six months thereafter.

(i) The provisions of this paragraph (3) shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before the Commission or any court by or against carriers subject to this chapter: *Provided, however*, That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 66 of this title, whichever is later.

(4) Joinder of parties; process; judgment.

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(5) Service of order of Commission and notices of proceedings.

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(6) Suspension or modification of orders.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

(7) Compliance with orders.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Failure of carrier or officer to obey orders; penalty.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

(9) Suit for recovery of forfeiture.

The forfeiture provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

(10) United States attorneys to prosecute for forfeitures; costs and expenses.

* * * *

(11) Employment of attorneys by Commission.

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(12) Proceedings to enforce orders other than for payment of money.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(13) Copies of schedules, tariffs, contracts, etc., kept as public records; evidence.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this chapter shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in

evidence with like effect as the originals. (Feb. 4, 1887, ch. 104, pt. I, § 16, 24 Stat. 384; Mar. 2, 1889, ch. 382, § 5, 25 Stat. 859; June 29, 1906, ch. 3591, § 5, 34 Stat. 590; June 18, 1910, ch. 309, § 13, 36 Stat. 554; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Oct. 22, 1913, ch. 32, 38 Stat. 219; Feb. 28, 1920, ch. 91, §§ 423-429, 41 Stat. 491, 492; June 7, 1924, ch. 325, 43 Stat. 633; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 11(a), (b), 54 Stat. 912, 913; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Aug. 2, 1949, ch. 379, § 6, 63 Stat. 486; Aug. 26, 1958, Pub. L. 85-762, § 1(1), (2), 72 Stat. 859.)

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§ 41. Liability of corporation carriers and agents; offenses and penalties.

(1) Liability of corporation common carriers; offenses; penalties; jurisdiction.

* * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; * * *.

(2) Liabilities for acts of agents; departure from published rates.

* * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42, or 43 of this title, shall be conclusively

deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Receiving rebates; additional penalty and recovery thereof.

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(Feb. 19, 1903, ch. 708, § 1, 32 Stat. 847; June 29, 1906, ch. 3591, § 2, 34 Stat. 587.)